MOTION FILED

SEP 2 0 2002

Nos. 01-653, 01-657

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., *et al.*,
Respondents.

ARCTIC SLOPE REGIONAL CORP., *et al.*,
Petitioners,

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
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Released: September 12, 2002

COMMISSION SEEKS COMMENT ON DISPOSITION OF DOWN PAYMENTS AND PENDING APPLICATIONS FOR LICENSES WON DURING AUCTION NO. 35 FOR SPECTRUM FORMERLY LICENSED TO NEXTWAVE PERSONAL COMMUNICATIONS INC., NEXTWAVE POWER PARTNERS, INC. AND URBAN COMM -- NORTH CAROLINA, INC.

WT Docket No. 02-276

Auction Event No. 35

Comment Date: October 11, 2002
Reply Comment Date: October 21, 2002

BACKGROUND

On March 26, 2002, the Commission granted partial refunds of the down payments made by certain winning bidders in Auction No. 35.[1] These winning bidders had made down payments and filed long-form applications for spectrum

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[1] Requests for Refunds of Down Payments Made In Auction No. 35, *Order*, FCC 02-99 (rel. Mar. 27, 2002) ("*Partial Refund Order*").

associated with licenses that had previously been issued to NextWave Personal Communications Inc., NextWave Power Partners Inc. (collectively "NextWave") and Urban Comm-North Carolina, Inc. ("Urban Comm"). This spectrum, as well as Auction No. 35, continues to be the subject of extensive litigation and pending regulatory proceedings.[2] Key issues over the effectiveness of the Commission's automatic cancellation rules with respect to NextWave's licenses are scheduled for oral argument before the Supreme Court on October 8, 2002.[3]

Pursuant to the *Partial Refund Order*, the Commission has already refunded approximately $2.8 billion to the Auction No. 35 winning bidders who have not yet received their licenses, but it retained an amount equal to three percent of the net

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[2] *NextWave Personal Communications Inc. v. FCC*, 254 F.3d 130 (D.C. Cir. 2001), *cert. granted*, __ U.S. __, 70 U.S. L.W. 3317, 70 U.S.LW. 3545, 70 U.S.L.W. 3351 (March 4, 2002) (Nos. 01-653, 01-657); *In re NextWave Personal Communications, Inc.*, 200 F.3d 43 (2d Cir. 1999); *Cellco Partnership d/b/a Verizon Wireless v. FCC*, D.C. Cir. No. 02-1110 (filed April 8, 2002); *Cellco Partnership d/b/a Verizon Wireless v. United States*, C.F.C. No. 02-280c (filed April 5, 2002); *In re Urban Comm-North Carolina, Inc.*, Case No. 98-B-10086 (REG), Adv. Proc. No. 99/8125A; Applications for Review, dated March 17, 1997 and June 16, 1997, filed by Antigone Communications, L.P. and PCS Devco, Inc.; Petition to Initiate an Investigation and Audit Regarding the Eligibility of NextWave Personal Communications, Inc. and NextWave Power Partners Inc. to Hold C and F Block licenses, filed by Alaska Native Wireless, L.L.C., Verizon Wireless, and VoiceStream Wireless Corporation, dated July 19, 2001; Petition for Reconsideration, filed by Alaska Native Wireless, L.L.C. and VoiceStream Wireless Corporation, dated October 12, 2001; Petition to Deny Reinstatement of Licenses, filed by Alaska Native Wireless, L.L.C., and VoiceStream Wireless Corporation, dated August 30, 2001.

[3] *See FCC v. NextWave Personal Communications Inc., cert. granted*, __ U.S. __, 70 U.S.L.W. 3317, 70 U.S.L.W. 3545, 70 U.S.L.W. 3551 (U.S. March 4, 2002) (Nos. 01-653, 01-657).

winning bids for these licenses and maintained the pending status of the applications for these licenses. The total amount still on deposit with the Commission is $489,548,061. The total amount of these Auction No. 35 winners' obligations, including the refunded down payments, to the government for the former NextWave and Urban Comm licenses won at the auction is $16,318,268,700. The Commission has already received $504,419,150 in final payments for other licenses won and granted based on Auction No. 35.

As noted in the *Partial Refund Order*, the Commission was sympathetic to the needs of the auction winners, many of whom are small businesses, to have access to their funds to continue to operate their businesses. At the same time, the Commission held that it must protect the integrity of Auction No. 35 in the event the Commission is ultimately successful in its litigation. It therefore struck a balance between the hardship that would be imposed by continuing to retain the entirety of the down payments and the need to protect the integrity of the auction. Accordingly, it refunded to the payors of record a substantial portion of the monies on deposit.

However, the Commission's *Partial Refund Order* also found, *inter alia*, that the continued litigation associated with particular licenses *did not* relieve the winning bidders of the obligation to pay their full bid amounts for licenses won in Auction No. 35. In this regard, the Commission disposed of matters raised by Verizon in a letter to the Commission's Deputy General Counsel in which Verizon argued that it no longer had an obligation to pay the amount it bid in Auction No. 35 based on the theory that spectrum auctions create contractual relationships between the Commission and winning bidders, and that the Commission's failure to make timely

delivery of the licenses rendered the contract void.[4] No other Auction No. 35 applicant advanced this contract theory. In response to Verizon's letter, the *Partial Refund Order* stated that auctions are a regulatory mechanism for distributing licenses and that the relationship between the Commission and winning bidders of spectrum licenses is governed by the Communications Act, the Commission's competitive bidding regulations, and Public Notices setting forth specific conditions on particular auctions. Those conditions, the Commission stated, included the auction's contingency on the "final"outcome of the *NextWave* litigation.[5] Therefore, the Commission held that the fact that spectrum associated with the former NextWave licenses was not yet available for use by the Auction No. 35 winning bidders did not require the Commission to relieve Verizon of its bid obligations.[6]

Verizon challenged the Commission's *Partial Refund Order* in two courts.[7] In the D.C. Circuit, in case No. 02-1110, Verizon seeks a ruling that the delay in licensing caused by the NextWave litigation entitles Verizon to declare its auction obligations void. In the Court of Federal Claims, in case No.

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[4] *Partial Refund Order* at 9-10, ¶ 14-16.

[5] *Id.* at 9, ¶ 15.

[6] *Id.* at 9, ¶ 16.

[7] *See Cellco Partnership d/b/a Verizon Wireless v. FCC*, D.C. Cir. No. 02-1110 (filed April 8, 2002); *Cellco Partnership d/b/a Verizon Wireless v. United States*, C.F.C. No. 02-280c (filed April 5, 2002). The case pending in the Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") is at the briefing stage – Verizon Wireless's opening brief is due November 22, 2002, followed by the FCC's brief on January 8, 2003, and Verizon's reply on February 6, 2003. Oral argument is scheduled for April 15, 2003. In the case pending before the Court of Federal Claims, the government has requested that this case be held in abeyance pending disposition by the D.C. Circuit of the related case and the Supreme Court of the NextWave case.

02-280c, Verizon seeks a declaration nullifying Auction No. 35 as well as consequential damages. We stand by our legal conclusions in the *Partial Refund Order*, and do not through this Public Notice suggest any support for Verizon's legal argument.

DISCUSSION

Since the Commission issued its *Partial Refund Order* several months ago, the state of the capital markets for entities, including the applicants, engaged in the provision of wireless telecommunications services, as well as other telecommunications services, has continued to decline rapidly. Specifically, since March, the Commission has received submissions asserting that unique and troubling financial circumstances have led to difficulties in accessing capital and other problems for companies of all sizes, which in turn has affected the customers they serve.[8] For instance, these commenters suggest that the impact of continuing contingent liabilities on credit ratings in the midst of a severe downturn in capital markets could potentially frustrate other policy objectives as well as quality of service. Moreover, as we have seen in the past,[9] market downturns affect the value of spectrum licenses won at auction and licensees' (or applicants') ability to meet auction payment obligations. At the same time, the Commission remains concerned about protecting the integrity

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[8] *See* Letter to Michael K. Powell, Chairman, FCC, from Peter C. Crampton, *et al.*, at p.2 (Aug. 16, 2002); *See also* Letter to Michael K. Powell, Chairman, FCC, from Thomas E. Wheeler, Cellular Telecommunications & Internet Assoc., at p. 2 (Aug. 13, 2002).

[9] *In re Amendment of the Commission's Rules Regarding Installment Payment Financing for PCS Licensees*, 12 FCC Rcd 16,436 (1997) (*C Block Restructuring 2nd R &O*), *on recon.* 13 FCC Rcd 8345 (1998) (*Recon. of C Block Restructuring 2nd R & O), aff'd, U.S. Airwaves Inc. v. FCC*, 232 F.3d 227 (D.C. Cir. 2000).

of its spectrum auction program.[10] Concerns about the state of the capital markets must be balanced against this important public interest consideration.

Taking official notice of the status of the capital markets and other economic events, the Commission, on its own motion, seeks comment on the observations in the paragraph above and whether it should take further action with regard to the pending applications for licenses won during Auction No. 35 for spectrum formerly licensed to NextWave and Urban Comm.

Specifically, we seek comment on whether we should consider further, *inter alia*, the following scenarios:

(1) Full Refund and Option to Dismiss All Pending Applications. Upon request, the Commission would refund to the payor of record the full amount of monies on deposit with the Commission for the licenses subject to the NextWave litigation and Urban Comm proceedings. The Commission would also provide a period of time for individual applicants to request voluntary dismissal of all of their applications, with prejudice.

Under this scenario, applicants obtaining a full refund and choosing to dismiss their applications would lose all claims to the affected Auction No. 35 licenses.[11] Should the Commission prevail in the litigation, new initial licenses for the spectrum would be assigned by auction at a future date. In addition, the Commission would waive,

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[10] *C Block Restructuring 2nd R &O* , 12 FCC Rcd 16,436, ¶ 2-3 (1997).

[11] In addition to relinquishing any and all claims on the Auction No. 35 licenses, the bidder would also be required to release any other claims against the United States and the FCC arising out of Auction 35.

in whole or part, its default rules for these licenses and, subject to coordination with the Department of Justice pursuant to applicable federal claims collection standards,[12] forgive the debt incurred on them at Auction No. 35. We seek comment on whether it would be advisable to waive the default rules, or to extend debt forgiveness, in whole or in part, to a bidder opting for dismissal of its application(s). In addition, we seek comment on whether a bidder receiving a waiver or debt forgiveness should be barred from participating in the reauction of the licenses or otherwise obtaining such licenses for a period of time.[13] Finally, we seek comment on whether applicants that would like to keep their applications pending should reaffirm their commitment to their Auction No. 35 obligations or just remain silent.

(2) Selective Opt-Out for Pending Applications. The Commission would grant individual applicant requests for voluntary dismissal of their applications, with prejudice, for certain licenses and not others.

Under this scenario, the Commission would provide applicants the opportunity to pick and choose licenses for which to keep the applications pending and which to

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[12] *See* 4 C.F.R. Parts 101-105; *C Block Restructuring 2nd R &O*, 12 FCC Rcd 16436, ¶ 53-58 (1997); *U.S. Department of Justice Approves Debt Forgiveness for Personal Communications Services (PCS) C Block*, DA 98-1051, Public Notice (June 3, 1998).

[13] We note that in the C-block debt restructuring proceeding, licensees that surrendered licenses pursuant to the various options, under certain circumstances, were deemed ineligible to reacquire their surrendered licenses through reauction or by any other means for a period of two years from the start da of the next reauction. *Recon. of C Block Restructuring 2nd R & O*, 13 FCC Rcd 8345, ¶ 37 (1998).

dismiss.[14] We seek comment on whether all of the down payments should be refunded or only down payments associated with the dismissed licenses. As with the above scenario, applicants choosing to dismiss their applications would lose all claims to the affected licenses. Should the Commission prevail in the litigation, new initial licenses for the spectrum would be assigned by auction at a future date. In addition, the Commission would, in whole or part, waive its default rules for dismissed license applications and, subject to coordination with the Department of Justice pursuant to applicable federal claims collection standards, forgive the debt on them incurred at Auction No. 35. Again, we seek comment on whether a bidder opting for dismissal of its application(s) and receiving a full or partial waiver of the default payment rules should be barred from participating in the reauction of the licenses or otherwise obtaining such licenses for a period of time.

Although the oral argument in the Supreme Court case is fast approaching and the Commission has the utmost confidence in the merits of its case, the Commission and winning bidders in Auction No. 35 still face the possibility of prolonged litigation over such licenses during uncertain and trying economic conditions. We also recognize that should the Supreme Court rule in the government's favor, there may nevertheless be unresolved issues over the licenses, that would prolong the litigation. Depending on the length of the delay, capital market conditions may continue to change, increasing the possibility that winning bidders in Auction 35 will be in a significantly different position that at the time of the auction. Accordingly, we seek comment on the scenarios discussed above based on the changed circumstances since issuance of our *Partial Refund Order*. We also seek comment on whether

[14] *Id.* at ¶¶ 34-37.

granting relief under any of the options discussed herein would promote or disserve the public interest objectives outlined in Section 309(j) of the Communications Act, including "promoting economic opportunity. and competition" and ensuring "efficient and intensive use of the electromagnetic spectrum."[15]

PROCEDURAL MATTERS

Pursuant to 47 C.F.R. § 1.1200(a), the Commission may adopt modified *ex parte* procedures in particular proceedings if the public interest so requires. Accordingly, issues related to this Public Notice will be governed by "permit-but-disclose" *ex parte* procedures that are applicable to non-restricted proceedings under 47 C.F.R. § 1.1206.[16] Designating this matter as "permit but disclose" will provide an opportunity for all interested parties to comment on the policy questions concerning the treatment of the funds on deposit. All other matters concerning Auction No. 35 applications that are the subject of NextWave's Petition to Defer[17] and other petitions to deny remain restricted, pending further action by Public Notice.

Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before September 30, 2002, and reply

[15] 47 U.S.C. § 309(j)(3)(B) & (D).

[16] Parties making oral ex parte presentations are reminded that memoranda summarizing the presentation must contain a summary of the substance of the presentation and not merely a listing of the subject discussed. More than a one or two sentence description of the views and arguments presented generally is required. *See* 47 C.F.R. § 1.1206(b)(2).

[17] NextWave's Petition to Defer or, in the Alternative, to Condition Grant (filed March 9, 2001); Reply Comments of Verizon Wireless (filed March 16, 2001).

comments on or before October 15, 2002. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24121 (1998).

Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Vistronix, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554. All filings must be addressed to the Marlene H. Dortch, Secretary, Office of the Secretary, Federal Communications

Commission.

Action by the Commission on September 11, 2002: Chairman Powell, Commissioners Abernathy and Martin with Commissioner Copps concurring and issuing a statement.

FEDERAL COMMUNICATIONS
COMMISSION

Marlene H. Dortch
Secretary

CONCURRING STATEMENT OF COMMISSIONER MICHAEL J. COPPS

RE: Commission seeks comment on disposition of down payments and pending applications for licenses won during Auction No. 35 for spectrum formerly licensed to NextWave Personal Communications Inc., NextWave Power Partners, Inc. and Urban Comm – North Carolina, Inc. (Auction Event No. 35)

I believe that there are strong equitable arguments to support returning the remaining funds on deposit related to Auction 35, and even for dismissing all pending applications related to that auction. But I am frankly somewhat concerned about the timing of today's Public Notice, as drafted. I have been in this town long enough to know that there is something called the Law of Unintended Consequences, and I never underestimate its power. I must, therefore, concur rather than approve of this action.

Federal Communications Commission FCC 97-342

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Amendment of the Commission's	)	WT Docket No. 97-82
Rules Regarding Installment	)	
Payment Financing For Personal	)	
Communications Services (PCS)	)	
Licensees	)	

Second Report and Order and
Further Notice of Proposed Rule Making

Adopted: September 25, 1997 Released: October 16,1997

Comments Due: November 13, 1997
Reply Comments Due: November 24, 1997

By the Commission: Chairman Hundt affirming and dissenting in part and issuing a statement; Commissioner Quello issuing a separate statement at a later date, Commissioners Ness and Chong issuing separate statements.

I. INTRODUCTION

1. By this *Second Report and Order*, we order resumption of installment payments for the broadband Personal Communications Services (PCS) C and F blocks, with the payment deadline reinstated as of March 31, 1998. We adopt disaggregation, amnesty, and prepayment options designed to

assist C block licensees experiencing financial difficulties to build systems that will promote competition or surrender spectrum to the Commission for reauction. These provisions will create opportunities to provide service to the public while maintaining the fairness and integrity of our auctions program. We seek comment on proposed changes to our C block rules to govern the reauction of surrendered spectrum in the C block in the accompanying *Further Notice of Proposed Rule Making*.

II. EXECUTIVE SUMMARY

2. The extraordinary procedures we adopt today apply to all C block licensees. In considering the many options presented, which range from merely enforcing our existing rules to completely rewriting our rules after the auctions closed, we have considered and balanced the following policy goals.

- Maintaining the integrity of the Commission's rules and auction processes.

- Ensuring fairness to all participants in our auctions, including those who won licenses in the auctions and those who did not, as well as licensees in competing services.

- Resolving issues now in a manner that does not merely postpone the problem.

- Complying with the mandate of our auction authority in Section 309(j) of the Communications Act of 1934, as amended ("Communications Act"), that we ensure "that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants,

including small businesses . . ."[1]

- Promoting economic opportunity and competition in the marketplace.[2]

3. Maintaining the integrity of our rules and auction processes in an essential goal. As Senator John McCain observed on September 18, the Balanced Budget Act mandates a series of future spectrum auctions, and the Commission's decisions on C block must not "adversely impact the integrity of the auction process or the confidence that parties would have in the stability of the Commission's auction rules."[3] We are not looking to maximize revenues, but to maintain the integrity for all of our future auctions and to ensure that all participants are treated fairly and impartially. These elements are essential if the financial community is to have the stability it requires to fund the new communications enterprises and services for which this spectrum should be used.

4. We conclude that it is in the public interest to immediately adopt provisions to facilitate use of C block licenses without further regulatory or marketplace delay. Certainty is beneficial to all C block licensees and will foster the increased competition we expect in the marketplace. Many small licensees bid amounts comparable to those of other PCS spectrum, yet are being delayed in acquiring financing for their construction while these matters are pending before the Commission. Some of the larger licensees also find that they can move forward only when we settle the regulatory issues.

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[1] *See* 47 U.S.C. § 309(j)(3)(B). *See also* 47 U.S.C. § 309(j)(4)(D).

[2] *See* 47 U.S.C. §§ 309(j)(3)(A), (B).

[3] The Honorable John McCain, *ex parte* letter, September 18, 1997.

Our actions today are intended to restore regulatory certainty to the marketplace.

5. Consistent with our goals, we have rejected a number of restructuring proposals that would have dramatically changed the amount bid for licenses, and instead offer relief that is more modest in nature. Our menu approach is intended to provide options to facilitate the rapid introduction of service to the public, while recognizing that ultimately the decisions concerning competition and services appropriately are marketplace decisions and should not be determined by government intervention. Our decisions are intended to be fair to current C block licensees, to bidders who were not successful in their attempts to obtain licenses in this spectrum, and to the public desiring new and innovative competitive services.

6. On March 31, 1997, in response to a joint request from several C block licensees seeking to modify their existing installment payment obligations, and because of other debt collection issues, the Wireless Telecommunications Bureau ("Bureau") suspended the deadline for payment of all C block installment payments.[4] On April 28, 1997, the Bureau extended the suspension to F block licensees.[5] We rescind the suspension of payments, effective March 31, 1998. On that date, all F block licensees must resume payments under their original Installment Payment Plan Note (hereinafter in the singular, "Note" and in the plural, "Notes"). Any C block

[4] *See* Installment Payments for PCS Licenses, Order, DA 97-649 (rel. March 31, 1997).

[5] *See* "FCC Announces Grant of Broadband Personal Communications Services D, E, and F Block Licenses," *Public Notice*, DA 97-883 (rel. April 28, 1997) at 2.

licensee may elect to continue making payments under its Note(s) or may elect one of three options described below. These three options are designed to provide limited relief for C block licensees having difficulty meeting their financial obligations to the Commission while maintaining the fairness and integrity of our auctions program. The election must be made no later than January 15, 1998. Any C block licensee that fails to elect on a timely basis either to continue under its existing Note or one of the available options, will be held to strict adherence with the terms of its existing Note(s). The options are as follows:

- ***Disaggregation.*** Any C block licensee may elect to disaggregate one- half of its spectrum (15 MHz of its 30 MHz) and surrender such spectrum to the Commission for reauction. A licensee must disaggregate spectrum for *all* of the Basic Trading Area (BTA) licenses it holds within any Major Trading Area (MTA), but need not disaggregate the licenses it holds in other MTAs. In return, the licensee will have the proportionate amount, *i.e.*, 50%, of its down payment on such licenses forgiven. Fifty percent of the down payment for those licenses will be applied towards the debt for the retained spectrum; the licensee will not get a refund or credit of the other 50% of its deposit. The licensee will be prohibited from rebidding for this spectrum, or otherwise acquiring it in the secondary market, for two years from the date of the start of the reauction. C block licensees electing this option will repay over eight equal payments (beginning with the payment due on March 31, 1998) all interest that has accrued and was unpaid due to the payment suspension, adjusted to reflect the reduction in debt obligation. Any prior installment payments made will be credited in full against those amounts.

- ***Amnesty.*** Any C block licensee may surrender *all* of its

licenses, and in return will have all of its outstanding C block debt forgiven. The single exception to the "all-or-nothing" requirement for a grant of amnesty applies to licensees that met or exceeded the five-year build-out requirement by September 25, 1997. Those licensees meeting this build-out exception may retain their built-out BTAs, but must also keep the other BTAs in the MTA where the build-out requirement has been met. The licensee choosing the amnesty option will not have its down payment amounts returned. All installment payments made will be refunded or applied to previously accrued interest for retained markets, subject to applicable federal debt collection laws. The licensee may bid on any of its surrendered licenses or any other licenses in the reauction, and there is no restriction on after-market acquisitions.

• ***Prepayment.*** Any C block licensee may use an amount equal to 70% of its total down payments for the licenses that it wishes to surrender as a credit toward the prepayment of any of its licenses, at face value of the Note. Subject to the amounts available for license prepayment, a licensee must pay off the outstanding principal debt obligations for all BTA licenses it holds within any single MTA, up to the amount of funds it has available. A licensee may also use additional monies (hereinafter referred to as "new money"), to prepay as many of its Notes as it desires. Installment payments made will be available to the licensee as a credit towards prepaying any of its Notes. Interest accrued from the date of the conditional license grant through the Election Date will be forgiven. Licenses that are not prepaid in accordance with this option must be surrendered to the Commission for reauction, in exchange for the Commission's forgiveness of the corresponding debt and permitting prepayment on other licenses under these terms. The remaining 30% of the down payments plus any unapplied portions of the first 70% of the down payments will not be

returned or available to licensees. The licensee may not rebid in the reauction for any of the licenses that the licensee relinquishes, and for a period of two years from the start date of the reauction may not otherwise acquire any such licenses in the secondary market.

7. These options will lead to a reauction of C block spectrum that will be open to all entrepreneurs, all applicants to the original C block auction,[6] and, with the exceptions we outline under the disaggregation and prepayment options, all current C block licensees. In the *Further Notice of Proposed Rule Making*, the Commission seeks comment on proposed rules and procedures for the reauction of any available C block licenses, including auction design, activity requirements, minimum opening bids for each license, application and payment procedures, procedures for filing petitions to deny, and proposals regarding the use of bidding credits.

III. BACKGROUND

8. Incentives to ensure participation by small businesses and other "designated entities" were required by Congress when enacting our authority to conduct auctions, as set forth in Section 309(j) of the Communications Act.[7] In accordance with its statutory mandate, in the *Competitive Bidding Fifth Report and Order*, the Commission established a variety of incentives to encourage small businesses to participate in the auction of C block 30 MHz and F block 10 MHz broadband

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[6] ***But see***, paragraph 84, *infra* (where we seek comment on restricting participation in the reauction by any entity that has defaulted on any FCC auction payment).

[7] 47 U.S.C. §§ 309(j)(4)(A), (D).

PCS licenses.[8] Provisions to promote participation by small businesses in broadband PCS included limiting eligibility in the initial C and F block auctions to entrepreneurs and small businesses, offering varying bidding credits, and offering installment payment plans. The installment payment plan for C block permitted licensees that qualified as small businesses to pay 90% of the bid price over a period of ten years, with interest only paid for the first six years and interest and principal for the remaining four.[9] Installment payments for small business F block licensees were limited to 80% of the bid price over ten years, and payments consist of interest only for the first two years, then interest and principal for the remaining eight years.[10]

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[8] *See* Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532 (1994) (*"Competitive Bidding Fifth Report and Order"*). Rules were amended in: Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Order on Reconsideration*, 9 FCC Rcd 4493 (1994); Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403 (1994) (*"Competitive Bidding Fifth Memorandum Opinion and Order"*); Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Sixth Report and Order*, 10 FCC Rcd 136 (1995). *See also* Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS, Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96-59, *Report and Order*, 11 FCC Rcd 7824 (1996); Amendment of the Commission's Cellular/PCS Cross Ownership Rule, GN Docket No. 90-314, *Report and Order*, 11 FCC Rcd 7824 (1996).

[9] 47 C.F.R. § 24.711(b)(3). In addition, there were other installment payment options available for bidders qualifying as entrepreneurs. *See* 47 C.F.R. §§ 24.711(b)(1)-(3). All bidders in the C block auction, however, qualified as small businesses.

[10] 47 C.F.R. § 24.716(b)(3). Entrepreneurs were also eligible for less favorable installment payment terms. *See* 47 C.F.R. §§ 24.711(b)(1)-(2).

9. On May 6, 1996 and July 16, 1996, the Commission concluded its broadband PCS C block auctions. Ninety bidders (including the C block reauction[11] winners) won 493 C block licenses. The broadband PCS D, E, and F block auction concluded on January 14, 1997, and 88 bidders won 491 F block licenses.[12] Net high bids[13] received for C block 30 MHz licenses, including C block reauction bids, totalled approximately $10.2 billion; net high bids received for F block 10 MHz licenses totalled $642.3 million.[14]

10. While many C block licenses were purchased for prices below or comparable to those for the A or B blocks, a handful of large bidders bid extremely high prices per pop for major markets, even adjusted for the value of the government financing we provide. The aggregate results of the C block auction, when measured in average price per pop paid, are markedly higher than the other PCS bands, even after adjusting for financing, and even though many individual small licensees bid prices comparable to those paid for the A and B block PCS licenses.[15]

11. Earlier this year, the Commission received several

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[11] *See* "18 Defaulted Licenses to be Reauctioned; Reauction to Begin July 3," *Public Notice*, DA 96-872 (rel. May 30, 1996).

[12] Bids were not submitted for two F block licenses, the Kokomo-Logansport, IN, BTA (B233) and the Kennewick-Pasco, MT, BTA (B228).

[13] "Net high bid" means the total amount bid less any bidding credit.

[14] Total bids received for all three 10 MHz licenses in the D, E and F block auction were $2.5 billion.

[15] *See* June 23, 1997, BT Wolfensohn Report in *"NextWave TeleCom Inc., Overview of Telecommunications Financing Considerations"*, attached to NextWave ex parte letter, June 23, 1997, and May 6, 1997, *Merrill Lynch High Yield Telecommunications Industry Update*.

requests, from both C and F block licensees, for relief associated with the installment payment program.[16] Some licensees sought relatively modest relief (*e.g.*, changing from quarterly to annual payments).[17] Other licensees sought more dramatic restructuring.[18] These requests described a range of apparent difficulties in accessing the capital markets, which many licensees argue were exacerbated by the relatively high prices per MHz per population ("per pop") paid for some of the C block licenses.

12. When formulating its original auction rules in 1994, the Commission considered the possibility of debt restructuring and observed that "if we allow a grace period or restructuring of the payment plan, we would follow our procedures ... under the Commission's existing debt collection rules and procedures."[19] We also said that in deciding whether to grant

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[16] *See* "Wireless Telecommunications Bureau Seeks Comment on Broadband PCS C and F Block Installment Payment Issues," *Public Notice*, DA 97-82 (rel. June 2, 1997) (*"Installment Public Notice"*). *See also* Letter from Thomas Gutierrez, Esq., *et al* to Michele C. Farquhar, Esq., Chief, Wireless Telecommunications Bureau (March 13, 1997).

[17] *See, e.g.*, NextWave Comments at 4.

[18] *See, e.g.*, Fortunet Reply Comments at 9.

[19] Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2346, 2389 (1994) (*"Competitive Bidding Second Report and Order"*). The Commission's current rules provide that any licensee whose installment payment is more than 90 days past due shall be in default, unless a "grace period" request is filed. See 47 C.F.R. § 1.2110(e)(4). In anticipation of default on one or more installment payments, a licensee may request that the Commission permit a three to six month grace period, during which no installment payments need be made. To obtain such relief, licensees may file financial information (*e.g.*, income statements or balance sheets) to demonstrate financial distress. Interest that accrues during the pendency of a grace period is amortized over the remaining term of the license. 47

grace period requests "or to pursue other measures," we would consider a variety of factors, including payment history, how far into the license term the default occurs, and the level of built-out.[20] We noted that if a grace period was granted, a licensee could use that time to "maintain its construction efforts and/or operations while seeking funds to continue payments or seek from the Commission a restructured payment plan."[21] When we later revisited the issue of licensee default, we stated that we would approve debt restructuring whereby a licensee and its lenders agree that in the event of licensee default on its installment payments, the lenders will cure the default by assuming the payments (barring assumption of license control).[22] Aside from these statements, the Commission has not discussed debt restructuring.[23]

C.F.R. § 1.2110(e)(4)(ii). Finally, these rules provide that following the expiration of any grace period without successful resumption of payment, or upon denial of a grace period request, or upon default with no such request submitted, the license of an entity paying on an installment basis is cancelled automatically and the Commission will initiate debt collection procedures. 47 C.F.R. § 1.2110(e)(4)(iii).

[20] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2391. In considering whether to grant a request for a grace period, the Commission may consider, among other things, the licensee's payment history, including whether the licensee has defaulted before, how far into the license term the default occurs, the reasons for default, whether the licensee has met construction build-out requirements, the licensee's financial condition, and whether the licensee is seeking a buyer under an authorized distress sale policy. 47 C.F.R. § 1.2110(e)(4).

[21] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2391.

[22] *See Competitive Bidding Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 471.

[23] But *see* "Wireless Telecommunications Bureau Staff Responds to Questions About Broadband PCS C Block Auction," *Public Notice* (rel. June 8, 1995) (addressing grace periods and other default questions).

13. *The Notice of Proposed Rule Making* to revise our Part 1 auction rules sought comment on several topics related to auction installment debt.[24] For example, we asked whether we should offer higher bidder credits in lieu of installment payments, or whether we should require, in an effort to reduce the likelihood of defaults, supplementation of the upfront payment during an auction when the cumulative high bids exceed some multiple of the upfront payment.[25] We sought comment on (1) imposing late payment fees on installment payments; (2) the default provisions of Section 1.2104(g) in the event of installment payment defaults; and (3) revised procedures for granting grace period requests.[26] Many commenters opposed any new fees for late submission of installment payments, and many favored simplified grace period procedures.[27]

14. On March 31, 1997, in response to a joint request from several C block licensees seeking to modify their installment payment obligations, and because of other debt collection issues, the Bureau suspended the deadline for payment of

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[24] Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding, *Order, Memorandum Opinion and Order, and Notice of Proposed Rule Making*, WT Docket No. 97-82, FCC 97-60 (rel. Feb. 28, 1997) (*"Part 1 Proceeding"*).

[25] *Part 1 Proceeding* at pp 34, 35.

[26] *Id.* at pp 70, 74, 77.

[27] *See* Comments filed in the *Part 1 Proceeding*, including: Interactive Video Data Trade Association ("ISTA") Comments at 1 and Reply Comments at 4-5; Pocket Comments at 7-8; Merlin Reply Comments at 4. Part 1 grace period comments: AMTA Comments at 12-13; Cook Inlet Region, Inc. ("CIRI") Comments at 16; Pocket Comments at 7-8; AirTouch Comments at 8; Merlin Reply Comments at 4; Airadigm Reply Comments at 2; ISTA Reply Comments at 5-6.

installment payments for all C block licensees.[28] On April 28, 1997, the Bureau extended the suspension to F block licensees.[29]

15. On June 2, 1997, the Bureau, explaining that it had received several proposals from C block licensees regarding alternative financing arrangements and a petition for rule making regarding the issue of broadband PCS C block installment payments, issued the *Installment Public Notice* seeking comment on these proposals and invited any "additional proposals for addressing the C and F block broadband PCS financing terms."[30] The Bureau also sought comment on whether C block licensees should be permitted to prepay their installment debt. In response to the *Installment Public Notice*, the Commission received over 160 filings.[31] The majority of commenters favor some type of relief, including debt restructuring, spectrum disaggregation, or a penalty-free license surrender ("amnesty"), followed by a reauction.[32] Other commenters express disapproval of any

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[28] *See* Installment Payments for PCS Licenses, *Order*, DA 97-649 (rel. March 31, 1997).

[29] *See* "FCC Announces Grant of Broadband Personal Communications Services D, E, and F Block Licenses," *Public Notice*, DA 97-883 (rel. April 28, 1997) at 2.

[30] *Installment Public Notice*.

[31] Appendix A contains a list of parties filing comments, reply comments, and *ex parte* comments, and the abbreviated names of the commenters.

[32] *See, e.g.*, NextWave Comments at 16-19; Fortunet Comments at 4-6; GWI Comments at 7-12; Horizon Comments at 13-15; Chase *ex parte* letter, August 11, 1997 at 1-2.

relief, and urge the Commission to strictly enforce its rules.[33] These comments were incorporated into the record in this docket.[34]

16. On June 30, 1997, the Bureau conducted a public forum in Washington, D.C. ("FCC Public Forum") to discuss broadband PCS C and F block installment payment issues, including the alternative financing arrangements proposed in connection with the Public Notices issued on June 2, 1997. The FCC Public Forum consisted of two panels. The first discussed whether the Commission should consider modification of its installment payment program,[35] and the second discussed alternative financing arrangements and debt

[33] *See, e.g.*, Airadigm Comments at 2-3; ALLTEL Comments at 2; CIRI Comments at 2-3.

[34] We also note that several requests for an extension of the deadline for making payments have been filed with the Bureau pursuant to 47 C.F.R. § 1.2110(e)(4)(ii). In addition, two parties have filed requests for the restructuring of installment payment schedules, and several parties have filed requests for annual, as opposed to quarterly payment schedules. These requests will be addressed separately by the Bureau in accordance with our decision today. Several parties also have filed requests for waiver of the 7 percent interest rate applicable to eligible broadband PCS C block licensees whose licenses were conditionally granted on September 17, 1996, and who elected to utilize the Commission's installment payment plan. See Comment Requested on 7 Percent Interest Rate Imposed on C Block Installment Payment Plan Notes, *Public Notice*, DA 97-1152 (rel. June 2, 1997). These requests also will be addressed separately by the Bureau in accordance with our decision today.

[35] *See* Cook Inlet Region, Inc., Petition for Rulemaking (filed May 7, 1997). Panelists were Michael Roberts, President, National Association of PCS Entrepreneurs; Roger Linquist, CEO, General Wireless Inc.; Stephen Hillard, CEO, Cook Inlet Communications Inc.; Karen Johnson, President, Fortunet Communications, L.P.; and Shelley Spencer, General Counsel, AirGate Wireless.

restructuring.[36] FCC staff members and the public audience also participated throughout the discussions.[37] An FCC Task Force also was established which included representatives from the Bureau, the Office of Plans and Policy, the Office of General Counsel, and the Office of Communications Business Opportunities. This Task Force was charged with evaluating proposals for alternative financing arrangements submitted by PCS C and F block licensees and recommending to the Commission how to respond to those proposals.

17. Both before and after the FCC Public Forum, numerous comments, reply comments, and *ex parte* letters and presentations were submitted to the Commission as part of this proceeding. Some commenters argue both for and against various proposals for licensee relief, while others argue that the Commission should enforce its rules as they currently exist to preserve the integrity of the auction program. The Commission thus has before it a wide range of proposals from entrepreneur block licensees, financial institutions and investors, equipment vendors, and other interested parties. We also have received a number of letters from individual Senators and Congressmen suggesting various approaches to resolving these issues and

[36] *See* Gutierrez Letter, Sawicki Letter, Barker Letter, and GWO informal proposal (attached to *Installment Public Notice*). Panelists were Norman Frost, Managing Director, Communications Group, Bear Stearns & Co.; John Bensche, Vice President/Senior Wireless Service Analyst, Lehman Brothers; Brian O'Reilly, managing Director-Communications Finance, Toronto Dominion Bank; Gregg E. Johnson, President, BIA Capital Corporation; and Mark Lowenstein, VP- Wireless/Mobile Communications, The Yankee Group.

[37] A videotape of the FCC Public Forum was placed in the record in this docket.

urging this Commission to act swiftly.[38] After consideration of the extensive record in this proceeding, we conclude that the options presented in this *Second Report and Order* offer the most appropriate and fair method of resolving C and F block financial concerns.

18. Although some commenters in this proceeding recommend deferral of the C block debt, the Commission declines to further explore these proposals.[39] We do not wish to

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[38] *See* The Honorable Christopher S. Bond, ex parte letter, July 14, 1997; The Honorable Pete V. Domenici, *ex parte* letter, September 10, 1997; The Honorable James M. Inhofe, Don Nickles, and Conrad Burns, *ex parte* letter, August 7, 1997; The Honorable John McCain, *ex parte* letter, August 19, 1997; The Honorable John McCain, *ex parte* letter, September 18, 1997; The Honorable Daniel Patrick Moynihan, *ex parte* letter, August 4, 1997; The Honorable Rick Boucher, *ex parte* letter, July 25, 1997; The Honorable Richard Burr, *ex parte* letter, August 11, 1997; The Honorable Thomas Davis, *ex parte* letter, July 30, 1997; The Honorable John D. Dingell, *ex parte* letter, September 16, 1997; The Honorable Steny H. Hoyer, *ex parte* letter, August 7, 1997; The Honorable Sue W. Kelly, *ex parte* letter, August 11, 1997; The Honorable W.J. "Billy" Tauzin, *ex parte* letter, August 13, 1997; The Honorable W. J. "Billy" Tauzin and Edward J. Markey, *ex parte* letter, September 16, 1997.

[39] Suggestions in the record addressing "deferral/restructuring" propose that the Commission provide for some period (ranging from 2-20 years) during which installment payments would be deferred. Some of these plans explicitly reduce the "net present value" of the debt (*i.e.*, the discounted value of future cash flows less initial investment), while others leave it unchanged, assuming the government interest rate as the discount rate. *See, e.g.*, BMU Comments at 2; ClearComm Comments at 3 and Reply Comments at 3; Chase Comments at 3; Alpine Comments at 9 and Reply Comments at 11; Horizon Comments at 13; SBC Comments at 9; R&S Comments at 21; Indus Comments at 3; MFRI Comments at 3; Magnacom Comments at 1-2; NABOB Comments at 3-4; RFW Comments at 2; KPCS Comments at 2; Urban Comm Comments at 9 and Reply Comments at 4; PCS Plus Comments at 2; Holland Comments at 3; Eldorado Comments at 2; MCI Comments at 2; Bear Stearns Comments at 3; Fortunet Comments

adopt temporary solutions such as those that might only postpone these difficulties and further prolong uncertainty. Although these approaches would not necessarily result in a reduction of the current nominal debt owed to the Commission, there is no certainty the long term financial outlook facing many licensees would be improved. Finally, we believe that any further deferral of payments would be unfair to unsuccessful bidders who may have withdrawn from the C block when prices became too high, but might have remained had deferral opportunities been known.

19. Similarly, we do not wish to adopt proposals that result in a dramatic forgiveness of the debt owed. Although such an approach would not defer the problem, we believe that is would be very unfair to other bidders, and would gravely undermine the credibility and integrity of our rules. In fact, in his remarks at the Senate Hearing on High-Definition Television, Senator Hollings stated, ". . . [r]ules are rules . . . . If they cannot comply with their particular auction bid, out they go, and we will start over again. But this is not welfare. This is business."[40] Other Senators also urged the Commission to maintain the integrity of its rules for benefit of its overall auction program.[41] Other commenters assert that lowering the effective price after the auction unfairly advantages those who

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at 4 and Reply Comments at 8; RTFC Reply Comments at 2; NextWave Reply Comments at 20; TRA Reply Comments at 5; The Honorable Thomas Davis *ex parte* letter, July 30, 1997; The Honorable Rick Boucher *ex parte* letter of July 25, 1997.

[40] Transition to Digital Television Hearing Before the U.S. Senate Committee on Commerce, Science and Transportation, 105th Cong., 1st Session (September 17, 1997) (Statement of Senator Hollings).

[41] *See* The Honorable John McCain, *ex parte* letter, September 18, 1997; The Honorable Paul D. Coverdell *ex parte* letter, September 24, 1997.

bid too high compared with those who withdrew.[42] In effect, the result could be interpreted as the Commission picking winners and losers on an unsupportable basis, instead of the marketplace determining winners based upon an auction. This concern was also expressed by Senator McCain.[43] Such a result would be contrary to our long-held goal to put licenses into the hands of those who value them the most.

20. In addition, we decline to make the disaggregation, amnesty, or prepayment options available to F block licensees. We believe that the nature and extent of any financing difficulties faced by the C block licensees appear to be different from any such problems facing entrepreneurs in the F block. We note that even after considering the difference in the spectrum block size and providing a discount for the government financing, C block prices were higher than F block prices on average. We therefore conclude that the options we adopt today will not apply to F block licensees.

IV. SECOND REPORT AND ORDER

21. As discussed above, we require that C and F block licensees resume their Note payments on March 31, 1998. They will also be required to pay on that date one-eighth of the Suspension Interest, and thereafter, pay one-eighth of the

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[42] *See, e.g.*, AirGate *ex parte* letter, July 22, 1997, attachment at 3; Conestoga Comments at 2-3; Point Comments at 2-3.

[43] *See* The Honorable John McCain, *ex parte* letter, August 19, 1997. In his letter Senator McCain states, "[t]he law does not, and indeed could not, require the Commission to substantially revise the rules that govern these entities solely for the purpose of guaranteeing their ability to retain licenses. . . . To do so would be to unjustly enrich defaulting bidders...[and] unjustly penalize the rest of the bidders in all the PCS auctions who bid reasonably and in reliance on the existing rules."

Suspension Interest with each regular installment payment made until the Suspension Interest is paid in full. As used herein, "Suspension Interest" means the entire amount of the unpaid simple interest that was accrued at the rate set forth in each licensee's Note(s) during the period beginning with the date on which each license was conditionally granted through and including March 31, 1998 ("Suspension Period"). After March 31, 1998, payment due dates will conform to those indicated in the Notes executed by the licensees. We believe that there are C block licensees who will elect to continue making payments under their original C block Notes, as described above, which they will be entitled to do. In addition, we adopt three options relating to the rules governing installment payments for the C block. These are designed to help to resolve the financing issues facing C block licensees and restore certainty to the marketplace, while at the same time helping the Commission meet its statutorily mandated public interest considerations set forth under Section 309(j) of the Communications Act.[44]

22. These goals will also be furthered by generally applying the same rules regarding eligibility that were used in the C block auction to the reauction of C block licenses.[45] Thus, all applicants meeting the current definition of "entrepreneur" will be eligible to bid in the reauction. We also will allow all entities that were eligible for and participated in the original C block auction to bid in the reauction. Further, with the exception of incumbent licensees who choose to disaggregate portions of spectrum they currently hold (*see*

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[44] *See* 47 U.S.C. § 309(j)(3)(A)-(E). Any party holding a C block license as of the January 15, 1998 election deadline will be permitted to elect any of the options we adopt.

[45] *See* 47 C.F.R. § 24.709.

Section IV.B., *infra*), and those licensees who surrender licenses under the prepayment option (*see* Section IV.D., *infra*), all C block licensees who return licenses to the Commission will be eligible to bid on all markets in the reauction.

A. Resumption of Payments

23. *Background*. On March 31, 1997, the Bureau suspended the deadline for payment of all broadband PCS C block installment payments until further notice.[46] By Public Notice issued on April 28, 1997, the Bureau extended the suspension to F block licensees.[47] (The March 31, 1997 Order and April 28, 1997 Public Notice will be referred to collectively as the "*Suspension Order*"). In the *Suspension Order*, we indicated that the suspension would remain in effect until further action to reinstate payment deadlines, and that interest would continue to accrue until such action was taken.

24. *Discussion*. The majority of commenters in this proceeding, including many members of Congress, agree that the Commission must act quickly to make a decision on what course of action to take.[48] Those favoring restructuring suggest

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[46]*See* n.28, *supra*. *See also* Letter from Daniel B. Phythyon, Acting Chief, Wireless Telecommunications Bureau to Mark J. Tauber, Piper & Marbury (April 30, 1997) ("Tauber Letter").

[47]*See* n.29, *supra*.

[48]*See, e.g.*, ClearComm Comments at 3; Chase Comments at 2; Alpine Comments at 11 and Reply Comments at iii, 9; AmeriCall Comments at 10; MCI Comments at 2 and Reply Comments at 7-8; Cellexis Reply Comments at 2-3; OnQue Reply Comments at 10; NextWave Reply Comments at 5-6; The Honorable W. J. "Billy" Tauzin and the Honorable Edward J. Markey *ex parte* letter, September 16, 1997; The Honorable John Dingell, *ex parte* letter, September 16, 1997; The Honorable John McCain *ex parte* letters of August 19, 1997 and September 18, 1997.

that any further delay will make any relief ineffective because further delay to market puts C block licensees at a competitive disadvantage and makes attracting investment capital to support their build-out even more difficult.[49] In addition, many commenters opposed to restructuring also support a timely decision, believing that a cloud of uncertainty hangs over the wireless sector until the Commission decides what action to take.[50] We therefore believe that it is necessary to remove any uncertainties surrounding the installment payment program by announcing a date certain for the resumption of installment payments.

25. Accordingly, effective March 31, 1998, we rescind the *Suspension Order* and reinstate the installment payment plans for all C and F block licensees. We also direct that all payments due and owing on and after March 31, 1998 be made in accordance with the terms of each licensee's Note, associated Security Agreement, and the Commission Orders and regulations. All Suspension Interest will become due and payable over a two-year period as discussed in paragraph 27, *infra*. With the exception of the modifications provided in this *Second Report and Order*, all Commission rules regarding installment payments and defaults for the broadband PCS C and F blocks will remain in effect. Any licensee that fails to remit the payment due on March 31, 1998, and remains delinquent for more than 60 days (*i.e.*, fails to make the March 31, 1998, payment on or before May 30, 1998), will be in

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[49]*See, e.g.*, MCI Reply Comments at 7-8 (quoting "Bensche Marks" July 1, 1997, summary of panel discussions at the FCC Public Forum of June 30, 1997).

[50]*See, e.g.*, U.S. Airwaves Reply Comments at 3; Nokia *ex parte* letter, September 15, 1997 at 1; AmeriCall, ClearComm, and Chase, *ex parte* letter, September 17, 1997 at 1.

default on its license.[51] Given the one year suspension, we believe that providing a shorter automatic grace period is justified. *See* paragraph 30, *infra*.

26. We conclude that any licensee that continues under its original Note(s), will be required to pay on March 31, 1998, one-eighth of the Suspension Interest in accordance with the provision of paragraph 27, *infra*. Thereafter, regular payments will become due and payable in accordance with the provisions of the licensee's original Note.[52]

27. We conclude that it could place a significant burden on licensees to require payment of the entire amount of the Suspension Interest on March 31, 1998. We therefore require that broadband PCS C and F block licensees submit one-eighth of the Suspension Interest on March 31, 1998, and one-eighth of the Suspension Interest with each regular installment payment made thereafter until the Suspension Interest is paid in full. After March 31, 1998, payment due dates will conform to those indicated in the Note(s) executed by the licensees. While the first regular installment payment next made after March 31, 1998, will be pro-rated to account for the resumption of payments on March 31, 1998, all regular installment payments thereafter will be in the amounts shown on the amortization schedule attached to and made a part of each Note, as amended, plus the applicable payments of Suspension Interest. For example, for those licensees granted in September, 1996 whose regular installments occur on March 31, June 30, September 30, and December 31 of each year, the next regular payment due after March 31, 1998, will be due on

[51] *See* 47 C.F.R. § 1.2110(e)(4)(i). The 60-day period is an exception to our existing rules that provide for an automatic 90-day non-default period.

[52] *See* the provisions of paragraph 27, *infra*.

June 30, 1998, and will include the amount of interest accrued from April 1, 1998, through and including June 30, 1998, plus one-eighth of the Suspension Interest. The next regular payment will be due on September 30, 1998, and will be due in the amount shown on the amortization schedule attached to the Note (*i.e.*, interest from July 1, 1998, through and including September 30, 1998), plus one-eighth of the Suspension Interest. Regular payments will continue on each and every December 31, March 31, June 30, and September 30 thereafter until the Note is paid in full. For these licensees, the payment due on December 31, 1999, will be the last payment due that includes any amortized Suspension Interest.[53] All payments after that date will continue in accordance with the terms of the amortization schedule attached to the Note executed by the licensee. All installment payments previously made by licensees who elect one of the three options will be applied in accordance with the provisions set forth under the discussion of

[53] For those licenses granted in November, 1996 whose regular installments occur on the last day of May, August, November, and February of each year, the next regular payment due after March 31, 1998, will be due on May 31, 1998, and will include the amount of interest accrued from April 1, 1998 through and including May 31, 1998, plus one-eighth of the Suspension Interest. The next regular payment will be due on August 31, 1998, and will be due in the amount shown on the amortization schedule attached to the Note (i.e., interest from June 1, 1998, through and including August 31, 1998), plus one-eighth of the Suspension Interest. Regular payments will continue on the last day of the month of November, February, May and August thereafter until the Note is paid in full. For these licensees, the payment due in February, 2000 will be the last payment due that includes any amortized Suspension Interest. Any payments after this date would continue in accordance with the terms of the amortization schedule attached to the Note executed by the licensee.

each option, *see* Section IV., *infra*.[54]

28. We delegate to the Bureau authority to set forth all procedures for implementing the resumption of payments.

29. Broadband PCS C block licensees choosing to surrender their licenses pursuant to the amnesty option described in Section IV.C., *infra* and those surrendering licenses that are not prepaid pursuant to the prepayment option described in Section IV.D., *infra*, will be required to return to the Commission each original Note and Security Agreement for cancellation by the Commission.

30. We will not entertain any requests for an extension of the March 31, 1998 deadline beyond the automatic 60-day non-default period set forth in paragraph 25, *supra*. The *Suspension Order* already has afforded a significant period to licensees during which payments were not required. Therefore, we intend to deny any requests for a grace period beyond the automatic 60-day non- default period we adopt herein, including any requests made pursuant to Section 1.2110 of the Commission's rules.[55]

31. C block licensees may resume payments under their current Note or elect one of the three options described below.

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[54] For example, for a licensee electing to continue making payments under its existing Note, if a licensee had accrued $100,000 in Suspension Interest during this period and had previously made installment payments totaling $20,000, then the amount of Suspension Interest would be $80,000 (no additional interest will be assessed against this amount) and would be payable in eight equal payments of $10,000.

[55] 47 C.F.R. § 1.2110(e)(4)(ii).

B. Disaggregation of Spectrum for Reauction

32. *Background.* Existing Commission rules permit broadband PCS licensees to disaggregate their spectrum.[56] Under these rules, a broadband PCS licensee in the A, B, D, or E block may file an application with the Commission requesting permission to disaggregate any portion of its spectrum to other eligible entities at any time following the issuance of its license.[57] The existing rules also permit a C or F entrepreneur block licensee to disaggregate spectrum to other C and F block eligible entities for the first five years following the issuance of a license.[58] After the first five years of holding a license, an entrepreneur block licensee also may disaggregate to any qualified non-entrepreneur, provided that the non-entrepreneur compensates the federal government through an unjust enrichment payment proportionate to the amount of spectrum disaggregated.[59] If the entrepreneur block licensee has elected to pay using installment payments, the qualified entity receiving the disaggregated spectrum will also be permitted to make installment payments equaling its *pro rata* portion of the remaining government obligation.[60] The rules require that new notes and security agreements be executed by

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[56] Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees, *Report and Order and Further Notice of Proposed Rule Making*, 11 FCC Rcd 21831 (1996) (partitioning and disaggregation rules now codified at 47 C.F.R. 24.714) (hereinafter "*Disaggregation Order*").

[57] See 47 C.F.R. § 24.714(a)(1) (parties "shall request an authorization for partial assignment of a license pursuant to Section 24.839").

[58] 47 C.F.R. § 24.714(a)(3).

[59] 47 C.F.R. § 24.714(c)(1).

[60] 47 C.F.R. § 24.714(d)(1).

both the former and the new licensee.[61]

33. A number of C block licensees, as well as several financial advisors and equipment manufacturers, have requested that the Commission permit licensees to disaggregate spectrum and surrender it to the Commission for reauction in exchange for a *pro rata* reduction in debt.[62] Generally, these proposals differ in: (1) the amount of spectrum that could be surrendered to the Commission; (2) the amount and form of credit for the spectrum surrendered; and (3) the terms and eligibility requirements for reauction of the disaggregated spectrum.

34. AmeriCall proposes "amnesty by thirds," which would permit each licensee to disaggregate its C block license into three 10 MHz portions, any one of which the licensee could surrender to the Commission for forgiveness of its related installment debt.[63] Under this proposal, surrendered spectrum would be reauctioned and the Commission would retain the down payments made by the initial licensee.[64] AmeriCall suggests allowing a licensee to participate in reauctions of C block spectrum, but only reauctions for spectrum other than that surrendered by the licensee.[65] AmeriCall also suggests that

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[61] 47 C.F.R. § 24.714(d)(3)(ii).

[62] *See, e.g.*, AmeriCall *ex parte* letter, August 5, 1997 at 1; GWI *ex parte* letter, August 15, 1997 at 1; Magnacom *ex parte* letter, August 13, 1997 at 1; BIA Capital *ex parte* letter, August 4, 1997 at 1-2; Nokia *ex parte* letter, September 16, 1997 at 1; Horizon Comments at 5-6 (all seeking a liberalization of the Commission's current rules for disaggregation to private parties).

[63] AmeriCall *ex parte* letter, August 5, 1997 at 2.

[64] *Id.*

[65] *Id.*

a licensee be required to wait two years before being allowed to reacquire spectrum that it has surrendered to the Commission.[66] AmeriCall proposes that C block licensees continue operating under the terms and conditions of the initial payment obligation, but that the Note be reduced in proportion to the amount of spectrum surrendered and the associated Security Agreements and Uniform Commercial Code ("UCC") filings modified accordingly.[67]

35. A number of other commenters propose that the Commission adopt variations of AmeriCall's disaggregation proposal. BIA Capital's disaggregation proposal generally tracks AmeriCall's proposal, but would allow licensees to surrender 10, 20 or 30 MHz of spectrum.[68] Magnacom proposes that parties be allowed to disaggregate up to 15 MHz of spectrum and that all payments be applied to the portion of the license retained.[69] Urban Comm advocates that parties be allowed to disaggregate up to 10 MHz of spectrum.[70] In a recent joint filing, AmeriCall, Clearcomm, and Chase support a disaggregation option that would allow a licensee to disaggregate 15 MHz from one or more of the C block licenses it now holds, on a license-by-license basis, and to have its indebtedness reduced proportionately (*i.e.*, by 50%). The disaggregated spectrum would be reauctioned expeditiously and the disaggregating licensee would be precluded from

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[66] *Id.*

[67] *Id.*

[68] BIA Capital *ex parte* letter, August 4, 1997 at 1-2.

[69] Magnacom,*ex parte* letter, August 13, 1997 at 1; *see also* Northern Michigan PCS Consortium, L.L.C.*ex parte* letter, August 14, 1997 (supporting the application of all payments to the debt owed to the FCC).

[70] Urban Comm *ex parte* letter, September 17, 1997 at 4-5.

rebidding on spectrum it has disaggregated.[71]

36. Parties advocating a disaggregation option cite a number of benefits. AmeriCall contends its "amnesty by thirds" proposal would help the Commission avoid both wide scale bankruptcies as well as the need for a "bail-out" in the form of radical debt restructuring.[72] It contends that by requiring licensees to forfeit all down payments for the surrendered spectrum, disaggregation imposes a *penalty* on C and F block licensees who choose this option.[73] AmeriCall argues further that spectrum disaggregation benefits participating licensees by allowing them to reduce their debt, which would in turn increase their access to capital markets.[74] AmeriCall contends that because it avoids the "more substantial financial fixes" advocated by other debtors, disaggregation is a fairer proposal, and one less prone to subsequent litigation.[75] Finally, AmeriCall contends that the "amnesty by thirds" proposal is pro-competitive in that it will introduce numerous new competitors, including licensees from other spectrum blocks.[76] GWI indicates that spectrum disaggregation "works well" for C block licensees in small markets where a full 30 MHz of spectrum is not required.[77] Urban Comm cites several public interest benefits deriving from spectrum disaggregation. According to Urban Comm,

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[71] AmeriCall, ClearComm, and Chase *ex parte* letter, September 17, 1997.

[72] AmeriCall *ex parte* letter, August 5, 1997 at 3-4.

[73] *Id.* at 3.

[74] *Id.* at 4. *See also* GWI *ex parte* letter, August 15, 1997 at 1.

[75] AmeriCall *ex parte* letter, August 5, 1997 at 4.

[76] *Id.* at 5.

[77] GWI *ex parte* letter, August 15, 1997 at 1.

disaggregation provides spectrum to qualified designated entities without delay, decreases time to market for existing licensees, and injects new competition into the marketplace.

37. In opposition to the disaggregation option, CONXUS, a narrowband PCS licensee, argues that the option does not confer on narrowband licensees benefits comparable to those accorded to broadband licensees since there is insufficient bandwidth in narrowband to allow disaggregation to occur without interfering with nationwide programs.[78] Omnipoint argues that any type of "amnesty solution," including spectrum disaggregation, would require the Commission to adopt rules protecting companies that have substantially built- out their networks.[79]

38. *Discussion*. In view of the substantial support and public interest benefits accruing from an alternative that would permit a voluntary surrender of spectrum to the Commission while maintaining the fairness and integrity of the auction, we adopt a disaggregation option. Under the disaggregation option we adopt today, any C block licensee may disaggregate a portion of its spectrum from each of its licenses and surrender it to the Commission for reauction.[80] The licensee must disaggregate 15 MHz of spectrum it holds across all BTAs in an MTA. These provisions prevent licensees from selectively surrendering spectrum for which they may believe they paid too much, or otherwise discarding spectrum in markets that may be more difficult to serve (commonly referred to as "cherry-

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[78] CONXUS *ex parte* letter, August 27, 1997 at 1-2.

[79] Omnipoint *ex parte* letter, September 5, 1997 at 2.

[80] *See* Section V., *infra* (*Further Notice of Proposed Rule Making* requesting comment on rules and procedures for reauction).

picking" of licenses or spectrum).[81] We limit the ability of licensees to selectively disaggregate spectrum within an MTA also to facilitate attempts by new bidders to aggregate spectrum and initiate service. Because we are allowing disaggregation on an MTA-by-MTA basis, special exemptions for built-out systems -- such as the one we adopt under the amnesty option discussed below in paragraphs 53-58 -- are unnecessary. In cases where a licensee has built-out a BTA, it can choose either to retain all 30 MHz in each of the BTAs it has licenses for in an MTA, or it can operate its built-out system with 15 MHz. We believe that this flexibility, compared to the "all-or-nothing" approach, mitigates the need for a build-out exception for this option.

39. Licensees electing this option will be required to return half of their spectrum at 1895 - 1902.5 MHz paired with 1975 - 1982.5 MHz, which is spectrum contiguous to the PCS F block. The surrender of spectrum adjacent to the F block will provide sufficient contiguous spectrum for both the incumbent and new licensees to offer competitive PCS services.

40. Under the disaggregation option, the Commission will reduce the amount of the debt owed by an amount equal to the *pro rata* portion of the spectrum returned to the Commission, *i.e.*, by 50%, subject to coordination with the Department of Justice pursuant to applicable federal claims collection standards.[82] The Commission will retain the *pro rata* portion of the down payments applicable to the spectrum. The following illustrates how this proposal would operate in

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[81] For example, if a licensee holds four BTA licenses in MTA No. 4 (comprising Northern California and Northern Nevada), the licensee must choose to disaggregate 15 MHZ from each or none of the four BTA markets.

[82] *See* 4 C.F.R. Parts 101-105.

practice:

> *Company X holds a 30 MHz license in a BTA market; paid the Commission $100,000 in its down payment; and owes the Commission $900,000 on a net bid of $1,000,000. Company X could disaggregate 15 MHz and surrender it to the Commission for reauction, and the Commission would retain $50,000 of the down payment. In return, the Commission would reduce the licensee's obligation to the government to $450,000.*

The face amount of the licensee's Note will be adjusted to reflect the new principal, and the Note will then be amortized from the original date of execution to calculate the payments at the new face amount of the Note. All installment payments made as of March 31, 1997,[83] will be applied to reduce the amount of the Suspension Interest calculated on the new principal balance to be made in eight equal payments beginning March 31, 1998.

41. Where applicable, the existing disaggregation rules will govern this option.[84] However, the broadband disaggregation rules were not designed for the surrender of spectrum to the Commission.[85] Thus, existing rule provisions on designated entity transfer restrictions,[86] unjust enrichment,[87]

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[83] This includes any payments due prior to and on March 31, 1997.

[84] *See* 47 C.F.R. § 24.714 (broadband PCS partitioning and disaggregation rules).

[85] *See Disaggregation Order*, 11 FCC Rcd 21831.

[86] 47 C.F.R. § 24.714(a)(3).

[87] 47 C.F.R. § 24.714 (c)(1), (2), (3).

installment payments, abbreviated license terms[88] and construction requirements,[89] restrictions on the amount of spectrum that can be disaggregated,[90] and similar rules will not apply to disaggregation to the Commission authorized by this option. In order to take advantage of the disaggregation option, licensees will be required to make an election consistent with the procedures specified in Section IV.E., *infra*.

42. In order to avoid unjust enrichment, licensees (defined as qualifying members of the licensee's control group, and their affiliates) will be prohibited from bidding in the subsequent reauction for spectrum the incumbent licensee has disaggregated. However, they will be permitted to acquire spectrum for any BTA for which the incumbent licensee has not disaggregated spectrum. We do not believe that it would be fair for these entities to benefit from a reauction after taking advantage of the disaggregation option. This prohibition against subsequent participation in the reauction for the spectrum disaggregated by the same party is supported by a number of commenters.[91] To ensure further against unjust enrichment, these entities will also be barred from reacquiring the spectrum they have surrendered to the Commission through a secondary market transaction for a period of two years from the start of a

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[88] 47 C.F.R. § 24.714(e).

[89] 47 C.F.R.§§ 24.714(f). Thus, a licensee that disaggregates spectrum to the Commission must still fully fulfill its original construction requirements with regard to the 15 MHz that it retains.

[90] 47 C.F.R. § 24.714(b)(3) ("Spectrum may be disaggregated in any amount").

[91] *See* Horizon Comments at 14; AmeriCall *ex parte* letter, July 11, 1997; AirGate Wireless,*ex parte* letter, Sept. 9, 1997.

reauction.[92]

43. We believe that the disaggregation option set forth above is consistent with our goals in this proceeding and serves the public interest. First, this option preserves the credibility and integrity of the Commission's rules. The relief we provide is another means of making more efficient use of the spectrum. It does not provide a windfall or unfair advantage to the C block licensees availing themselves of the disaggregation option. The disaggregating licensee continues to pay for spectrum at its net high bid price,[93] and the Commission receives full payment for the spectrum retained by the licensee. In addition, the Commission will retain 50% of the down payment consistent with the amount of spectrum being surrendered to the Commission. Moreover, disaggregation with a *pro rata* adjustment in debt is consistent with the Commission's rules with regard to private party disaggregation.[94]

44. Second, the disaggregation option is fair and equitable to all interested parties. Losing bidders and other eligible parties will have an opportunity to bid on the disaggregated spectrum in the reauction. Also, by limiting disaggregation of spectrum to 15 MHz blocks on a BTA within an MTA basis, we increase the likelihood that the licenses available for reauction will be in quantities and geographic clusters that are commercially viable. In addition, by providing this limited opportunity to "pick and choose" which licenses to disaggregate, and not requiring the surrender of all 30 MHz of

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[92] *See* AmeriCall *ex parte* letter, August 5, 1997 at 2.

[93] *See* n.13, *supra*.

[94] 47 C.F.R. § 24.714.

the spectrum it holds in an MTA, we make this option fair to those who have built- out some of their markets.[95] Although this option is not being made available to the narrowband or F block licensees, we do not believe that it is unfair to these parties or to other Commercial Mobile Radio Service ("CMRS") providers. This option does not materially alter the competitive landscape for CMRS services. Given the current state of the market and the Commission's existing rules, it is reasonable to expect that some C block spectrum will be transferred to competitors through reauction or private sale. Our actions here facilitate this process, by reducing the amount of spectrum that would otherwise be marketed in a piecemeal fashion. Moreover, as noted above, other parties will have an opportunity to bid on this spectrum in the reauction and, because of the spectrum's proximity to the F block, the spectrum may be particularly attractive to prospective licensees.

45. Third, the disaggregation option is consistent with our Section 309(j) obligation to promote opportunities for designated entities, including small businesses. According to a number of commenters, including those in the financial community, a reduced government debt burden and the resulting lower cost per MHz pop will enhance prospects for existing small business licensees to attract debt and equity capital.[96] This, in turn, should assist current C block licensees in moving forward with the deployment of their service offerings. Disaggregation will also provide opportunities for other small businesses to enter the PCS market in the future. Finally, by requiring C block licensees to disaggregate the 15

[95] *See, e.g.*, Omnipoint *ex parte* letters, August 18, 1997, September 3, 1997, and September 5, 1997 at 2.

[96] BIA Capital,*ex parte* letter, August 4, 1997 at 1.

MHz of spectrum adjacent to the F block, we provide opportunities for existing F block licensees to aggregate spectrum in a manner that could benefit their planned or prospective service offerings.

C. Surrender Licenses for Reauction (Amnesty)

46. *Background.* In response to our *Installment Public Notice* seeking comment on broadband PCS installment payment issues, a number of commenters express support for an option that would permit C block licensees to surrender their licenses to the Commission for reauction in exchange for forgiveness of the related debt and any interest and penalties[97] (generally referred to as "amnesty").[98] Commenters have submitted a variety of proposals for the terms of an amnesty option. Horizon states that an amnesty program should be designed to prevent a large scale surrender of licenses, and should encourage return of a license only in advance of a business failure. Horizon would permit a licensee to be selective in surrendering licenses, but would prohibit a licensee from rebidding on any license it surrendered and would prohibit a licensee's participation in the reauction entirely if it surrendered a total of more than five licenses. To facilitate this plan, Horizon asks that we waive our current cross default policies so that a licensee able to construct some, but not all, of its licenses will be able to return those licenses it cannot construct without placing all of its licenses in default. Horizon concludes that adopting such an amnesty plan would serve the

[97] *See* 47 C.F.R. §§ 24.708(b), 1.2109(c), 1.2104(g)(2).

[98] *See, e.g.*, R&S *ex parte* letter, August 11, 1997 at 1; MCI *ex parte* letter, August 14, 1997 at 2; Urban Comm *ex parte* letter, August 21, 1997; GWI *ex parte* letter, August 4, 1997; NextWave *ex parte* letter, July 29, 1997; El Dorado *ex parte* letter, August 13, 1997 at 2-3.

public interest by getting licenses in the hands of companies willing and able to provide service to the public.[99]

47. R&S[100] and Cyber Sites[101] propose that the Commission permit C block licensees to surrender their licenses and obtain a full refund of all payments without penalty. GWI suggests that the Commission allow licensees to exchange all licenses in return for a "store credit" equal to 100% of the original down payment, which could be applied to licenses won in a "cash upfront" reauction. GWI contends that there should be no restriction on the licensee's bidding in the reauction.[102] NextWave, too, supports an "amnesty day" for the surrender of licenses and a subsequent reauction, but stresses that licensees should be allowed to retain their most desirable licenses.[103] NextWave submits that the total amount of the original down payments should be credited toward reauction bids "with a reasonable penalty."[104]

48. Other commenters, including C block licensees AmeriCall[105] and Chase,[106] endorse a "simple amnesty" program pursuant to which a licensee would be obliged to surrender all of its C block licenses in return for forgiveness of

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[99] Horizon Comments at 13-15.

[100] R&S Comments at 13-15.

[101] Cyber Sites Comments at 3.

[102] GWI *ex parte* letter, August 4, 1997.

[103] NextWave *ex parte* letter, August 5, 1997.

[104] NextWave *ex parte* letter, August 5, 1997.

[105] AmeriCall *ex parte* letter, July 11, 1997; AmeriCall, ClearComm, and Chase *ex parte* letter, September 17, 1997.

[106] Chase *ex parte* letter, August 11, 1997.

its debt and an opportunity to participate in any reauction of the returned licenses or other licenses. Equipment manufacturer Nokia also endorses an amnesty program that would permit a licensee to surrender all of its C block licenses in return for forgiveness of all associated debt and an opportunity to bid at the reauction.[107]

49. Fortunet states that a simple amnesty program does not provide sufficient relief, and asks that licensees receive a refund of their down payments and interest payments made on those licenses surrendered.[108] MCI also supports permitting licensees to surrender all of their C block licenses with no further financial obligation, but suggests that a licensee be permitted to receive only "a fraction" of the down payment already made.[109]

50. In addition to the many commenters who oppose any rule changes, including a grant of amnesty,[110] a number of commenters have resisted implementation of an amnesty plan and have identified various problems specific to the amnesty option. Cook Inlet recommends that the Commission strictly enforce its rules as they currently exist, and take aggressive measures to collect all debt,[111] noting that other alternatives, including an amnesty plan, invite litigation and threaten the

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[107] Nokia *ex parte* letter, September 16, 1997.

[108] Fortunet Reply Comments at 5.

[109] MCI *ex parte* letter, August 14, 1997. *See also* Chase *ex parte* letter, August 11, 1997.

[110] *See, e.g.*, ClearComm *ex parte* letter, August 7, 1997, opposing "any substantially penalty-free amnesty" and advocating, inter alia, penalties such as denial of future designated entity status.

[111] Cook Inlet *ex parte* letter, August 5, 1997 at 1.

auction program's integrity.[112] However, Cook Inlet states that, if an amnesty program is adopted, certain limitations should be imposed, including prohibitions against participation in the reauction of their licenses by those who participate in amnesty (principals and control group members), against participation by any entity in bankruptcy, and against cherry picking among those licenses to be surrendered. In order to expedite reauction, Cook Inlet suggests that the Commission refund 25% of their down payments to licensees who surrender their licenses -- as "walk away" money.[113]

51. Omnipoint opposes amnesty because "operational" C block companies would be left with no recourse under any of the amnesty proposals, and would face a significant relative disadvantage in accessing capital markets. Omnipoint points out that this might deprive the public of the service that such licensees are providing.[114] Omnipoint states that it and other operational C block licensees have "operating businesses [that] are completely tied to specific C block licenses"[115] and do not have the same flexibility to cancel licenses voluntarily. Omnipoint asserts that these licensees' access to public capital markets will be hampered by policies that would, in effect, reduce per pop prices paid for similar properties *i.e.*, the surrendered C block licenses, and will strand those licensees

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[112] Cook Inlet *ex parte* letter, August 15, 1997.

[113] Cook Inlet *ex parte* letter, August 5, 1997 at 2-3. Cook Inlet argues that the Commission would also have to provide compensatory compliance benefit and transition rules for control group parties who are meeting debt obligations and are not subject to bankruptcy (*e.g.*, an additional 10 percent bidding credit in any reauction and relaxed control group and transfer rules). *Id.*

[114] Omnipoint *ex parte* letter, September 5, 1997.

[115] *Id.* at 2.

that have been significantly built- out with licenses that have "artificially higher prices" per pop.[116]

52. Like Omnipoint, Alpine argues that entities like itself, which bid in good faith and intend to construct their markets, will not be helped by an amnesty program.[117] However, Alpine supports an amnesty plan structured to encourage overextended licensees to take prompt remedial action and free up the C block for reauction and subsequent development. Alpine explains that the ability to roam is essential to the viability of its system and to that of other operational C block systems, but cannot be offered to potential customers if significant portions of the C block have not been developed. Therefore, Alpine endorses an amnesty option that would encourage speedy surrender and reauction by permitting licensees to turn in one or more of their licenses and to receive credit for the down payments, to be applied against other obligations.[118]

53. *Discussion.* We conclude that it serves the public interest as articulated in our goals, Section II, *supra*, to adopt an amnesty option that permits any C block licensee to surrender all of its licenses in exchange for relief from its outstanding debt and waive any applicable default payments, subject to coordination with the Department of Justice pursuant to applicable federal claims collections standards.[119] We adopt the amnesty option for purposes of speeding use of the C block spectrum to provide services to the American public. The surrender of licenses under this option will provide qualified

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[116] *Id.* at 3.

[117] Alpine Reply Comments at 9-11.

[118] Alpine *ex parte* letter, September 17, 1997 at 2.

[119] *See* 4 C.F.R. Parts 101-105.

parties with an opportunity to obtain C block licenses at the market value of the licenses prevailing at the time of the reauction. The amnesty option we adopt today is equitable to all parties because, while amnesty relieves a licensee from further debt obligations and any applicable default payments, a coordinated surrender of licenses facilitates expeditious reauctioning of the spectrum and will provide new market opportunities for all eligible entities. In addition, we note that rapid reauction of those licenses surrendered will also comply with the Congressional directive that we promote competition and participation in the telecommunications industry by small businesses.

54. A C block licensee must make the amnesty election in accordance with the procedures set forth in Section E, *infra*. The Commission will reauction those licenses surrendered on an expedited basis under the reauction rules discussed in the *Further Notice of Proposed Rule Making* adopted with this *Second Report and Order*. *See* Section V., *infra*. Licensees electing the amnesty option will be eligible to bid for any and all licenses at the reauction.

55. Licensees electing the amnesty option will not have their down payment returned. This will discourage speculation and ensure that all bidders, new entrants as well as existing licensees, participate in the reauction without undue advantage. Retention of the down payments -- 10% of the bid price for most licensees -- is consistent with our previous decisions and actions affecting C block bidders in that we have retained any payments made by those C block bidders who have failed to

make their first or second down payments.[120] We believe that by not finding these licensees in default and assessing any applicable default payments, we are according them a substantial benefit. In forgiving the outstanding debt we afford significant relief to the licensees by allowing them to avoid anticipated defaults. In addition, these licenses will not be deemed in default or delinquent in meeting government debt obligations. Nor will they be subject to any applicable default payments or in violation of any FCC rules or license conditions. Thus, their creditworthiness, financial qualifications, and other qualifications are preserved should they wish to take part in other federal loan programs[121] or apply for any future spectrum

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[120] *See*, Mountain Solutions LTD, Inc., Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Market Nos. B053, B168, B172, B187, B188, B224, B247, B275, B366, and B381, *Order*, 12 FCC Rcd 5904 (1997) (*application for review filed May 28, 1997 pending*); Carolina PCS I Limited Partnership, Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Market Nos. B016, B072, B091, B147, B177, B178, B312, B335, and B436, Order, DA 97-890 (rel. April 28, 1997) (*application for review filed May 28, 1997 pending*); C.H. PCS, Inc., Request for Waiver of Section 24.711(a)(2) of the Commission's Rules, Order, 11 FCC Rcd 9343 (1996); BDPCS, Inc., Emergency Petition for Waiver of Section 24.711(a)(2) of the Commission's Rules, *Memorandum Opinion and Order*, 12 FCC Rcd 3230 (1997), petition for reconsideration granted in part and denied in part, *Memorandum Opinion and Order*, FCC 97-300 (rel. Sept. 29, 1997).

[121] Under the Debt Collection Improvement Act ("DCIA"), no person may obtain any federal financial assistance if the person has an outstanding debt with any federal agency which is in a delinquent status. Pub. L. No. 104-134, § 3100(j)(1), 110 Stat. 1321 (1996), codified at 31 U.S.C. § 3720B. In addition, in the Part 1 Proceeding, the Commission adopted a certification procedure as part of changes to the application procedures whereby applicants must certify that the applicant is not in default on any payment for Commission licenses (including down payments) and that it is not delinquent on any non-tax debt owed to any federal agency. Bidders who cannot make this certification may be ineligible for installment payment

auctions or licenses.[122]

56. Subject to one exception identified below, licensees choosing to take advantage of the amnesty option will be required to surrender all of their licenses to the Commission. The requirement that *all* licenses be surrendered precludes licensees from "cherry picking." The simultaneous multiple-round auction design enables bidders to place bids on many licenses at once and to aggregate desired licenses in a manner that facilitates workable business plans. If we were to permit licensees to "cherry pick" which licenses to surrender, the interdependency of the licenses would be harmed. Licenses surrendered pursuant to such a "cherry picking" scheme might lack the potential for beneficial aggregation within MTAs, and therefore would likely be less valuable to potential bidders and impair business plans of new investors.

57. As an exception to the "all-or-nothing" requirement, licensees that have met or exceeded the five year build-out requirements by September 25, 1997, the date of adoption of this *Second Report and Order*, will not be required to surrender licenses for built-out markets. In addition, these licensees will be permitted to retain those BTA licenses in which such build-out has occurred. However, licensees availing themselves of this exception may not pick and choose BTAs within an MTA but will be required, instead, to keep all of the other BTAs in the MTA in which the build-out requirement has been met and to pay for those licenses under the terms of their Notes. The build-out exception facilitates the achievement of the statutory goal set forth in Section 309(j) that we encourage the rapid

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plans. Part 1 Proceeding at p 8.

[122] *See* 47 U.S.C. §§ 308(b), 309(j)(5).

provision of service to the public, and responds to the needs of licensees that have already commenced operations or have otherwise invested significantly in certain of their C block licenses. The Commission has an interest in minimizing the competitive impact of the changes that it makes to the auction rules, consistent with its broader policy objectives. The exception we adopt today is one method by which we can ensure that the menu of options available to the C block is fair to those licensees that have rapidly built-out their markets and initiated provision of competitive service.

58. Although the Bureau suspended installment payments on C block licenses on March 31, 1997, some licensees made their installment payments (*i.e.*, installments due on that date, and amounts due on December 31, 1996, but not paid until March 31, 1997, based on our automatic 90-day non-default rule) after the suspension. In addition, prior to the suspension of payments, many C block licensees made their regularly scheduled installment payments. We believe that due to the actions we take in this *Second Report and Order*, it would be unjust and inequitable for C block licensees to be treated differently merely because some C block licensees made prior payments while others did not. Consequently, we direct the Wireless Telecommunications Bureau to refund any installment payments made (whether due on or before March 31, 1997) on any license that is surrender pursuant to this *Second Report and Order*. In addition, we will forgive payment of any due, but unpaid, installment payments for any surrendered license.[123] For licensees exercising the build-out exception and retaining certain licenses, all previously made installment payments will

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[123] Forgiveness of this obligation will be subject to coordination with the Department of Justice pursuant to applicable federal claims collections standards. *See* 4 C.F.R. Parts 101-105.

be applied first to reduce the Suspension Interest applicable to those licenses, and any amounts remaining will be refunded.

D. Prepayment

59. *Background.* In the *Installment Public Notice*, the Bureau sought comment on whether PCS licensees should be permitted to prepay their installment debt at a discount, and on proposals for calculating the net present value of the debt.[124] In his presentation at the FCC Public Forum held on this issue, John Bensche of Lehman Brothers recommended prepayment by bidders as a way to avoid further restructuring in the future and to remove the government from its role as creditor to the wireless industry.[125] Bear Stearns also indicates that a prepayment option will improve the financial flexibility of C block licenses by eliminating the uncertainty surrounding the threat that a license will be revoked for financial reasons because lenders could collateralize their obligations with the licenses, at least indirectly, using the shares of the license-holding entity.[126]

60. Other commenters also support some form of prepayment option for C block licensees.[127] In a letter dated September 16, 1997, Representatives Edward J. Markey and W.J. "Billy" Tauzin urged the Commission to consider a "full price buy-out" proposal as part of a menu of options approach.

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[124] *See Installment Public Notice* at n.6.

[125] Presentation by John Bensche of Lehman Brothers at June 30, 1997, FCC Public Forum on Installment Payment Issues at 3. *See also* NextWave Comments at 9; GWI Reply Comments at 13-14.

[126] *See* Bear Stearns Comments at 4.

[127] *See, e.g.*, ClearComm Comments at 3.

Under this proposal, licensees could purchase at "full price" as many of their existing licenses as they desire with cash up front, for the net present value of the net bid prices for such licenses. They suggested that the licensees be allowed to use any monies on deposit with the Commission and any "new money" that the licensee may immediately muster. They agreed that this option had the benefit of allowing licensees to proceed with build-outs immediately, thereby bringing service to the public as quickly as possible, while also providing a meaningful opportunity for all interested parties to participate in an auction for the bulk of the licenses.[128]

61. Many commenters argue that a prepayment option should include a discount to lower the net high bid price of the licenses below A and B block prices.[129] For example, NextWave believes that a discount to A and B block prices is necessary due to the headstart that A and B block licensees have experienced in time to market, coupled with the restraints of the C block control group rules and the deterioration of the financial market conditions for wireless companies.[130] Other commenters believe that a prepayment discount should reflect the average of D and E block winning bids, with a multiplier of 2.25 applied to secondary and tertiary markets and 3.0 for top 100 markets.[131] In its *ex parte* letter, Triumph Capital suggests that the Commission apply a discount ranging from 15 percent

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[128] *See* The Honorable W.J. "Billy" Tauzin and the Honorable Edward J. Markey, *ex parte* letter, September 16, 1997.

[129] *See, e.g.*, ClearComm Comments at 3; Horizon Comments at 10-12; RTFC Comments at 3; Holland Comments at 3-4; Duluth PCS Comments at 1-2; GWI Comments at 8-10; NextWave Comments at 9-10. *See also* Alpine *ex parte* letter, September 23, 1997.

[130] NextWave Comments at 9-10 and Reply Comments at 22.

[131] Duluth PCS Reply Comments at 1-2.

to 30 percent to determine the present value of C block debt to the FCC.[132] GWI proposes to scale the C block bid using the ratio of the A/B block average cash bid to C block average bid. This scale factor would then be multiplied by the actual C block bid for that license to determine the scaled C block cash bid.[133] This scaled C block bid would then be discounted at a 14 percent discount rate for the government debt to determine the prepayment price.[134] NextWave suggests that a two- year period would be necessary for licensees to fund this prepayment as well as sustain operating expenses.[135]

62. Cook Inlet Region argues that any discounting of the net high bid price for purposes of prepayment would be unfair to the losing bidders in the C block auction and investors and creditors of the bidders in the auction.[136] Omnipoint also believes that a prepayment option is discriminatory against all of the winning bidders except the very large.[137] AirGate Wireless believes that permitting licensees to pay the net present value of their license costs at a discount would have the effect of rewriting the outcome of the C block auction, denying licenses to bidders who expressed through their bids a willingness to pay more than a discounted bid, and thereby arbitrarily choosing winners and losers.[138] Additionally, the

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[132] *See* Frederick W. McCarthy, Chairman, Triumph Capital to The Honorable Reed E. Hundt, Chairman, Federal Communications Commission *ex parte* letter, September 23, 1997 ("McCarthy Letter").

[133] GWI Comments at 10-12.

[134] GWI Comments at 9. *See also* Bear Stearns Comments at 3.

[135] NextWave Comments at 10.

[136] Cook Inlet Region *ex parte* letter, September 32, 1997 at 2.

[137] Omnipoint *ex parte* letter, September 23 1997 at 2.

[138] *See* AirGate Wireless *ex parte* letter, July 18, 1997 at 3.

SBA does not support a discount in the net bid amounts.[139] The SBA indicates that absent a detailed analysis of the bidders, the bidding process, round activity, financial environment and marketplace circumstances during each of the auctions, including a regression analysis to isolate individual factors, it cannot be determined that the adjusted marketplace value of C block should be based on either A and B block or D-F block bid amounts.[140] The SBA also indicates that "a reduction in principal would seriously undermine the integrity of the auction as well as set a dangerous precedent for small business participation in future auctions."[141]

63. Other commenters argue that a prepayment option is not viable for small businesses, or that it is otherwise inappropriate. BIA Capital contends that a prepayment option is not feasible because it would require small businesses to trade in debt capital from the government, which costs 7%, for private equity, which has a capital cost ranging from 30% to 40%.[142]

64. *Discussion*. Under the prepayment option we adopt, any C block licensee may prepay selective licenses subject to the restrictions described in this Subsection IV.D. All licenses that are not prepaid in accordance with this option must be surrendered to the Commission in exchange for a forgiveness

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[139] *See* Jere W. Glover, Chief Counsel, U.S. Small Business Administration and Jenell S. Trigg, Assistant Chief Counsel, Telecommunications, to The Honorable Reed E. Hundt, Chairman, Federal Communications Commission,*ex parte* letter, September 8, 1997 ("Glover Letter").

[140] *Id.* at 5.

[141] *Id.*

[142] BIA Capital Comments at 2-3.

of the corresponding debt and any penalties. A licensee selecting this option may apply 70% of the total of all down payments it made on the licenses that it elects to surrender to the Commission ("Available Down Payments"), to a prepayment of the Notes for as many of its licenses it wishes to keep.[143] The remaining down payments not applied to prepayment will be retained by the Commission. Additionally, an incumbent may use any "new money" to prepay as many of its own licenses as it desires. Any installment payments previously made by the licensee for all its licenses will be added to the Available Down Payments to increase the funds available to prepay its Notes. Interest accrued from the date of the conditional license grant through the Election Date will be forgiven. For purposes of this option, the down payment associated with licenses that are transferred as of the Election Date to subsidiaries or affiliates will be considered transferred with the licenses and the corresponding debt.[144]

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[143] For example, if a licensee held two licenses with net high bids of $100 and $200, then the total down payments would equal $30 ($10 + $20). If the licensee elected to keep the $200 license, the licensee would have $7 ($10 x 70 percent) of its down payment from the $100 license to apply towards the prepayment of the $200 license's Note. If, on the other hand, the licensee elected to prepay the $100 license, then the licensee would have $14 ($20 x 70 percent) of its down payment from the $200 license to apply towards the prepayment of the $100 license's Note.

[144] For example, if ABC Company paid $100,000 each for two licenses and submitted $10,000 in down payments for each license, the total down payments submitted by ABC Company would be $20,000. However, if ABC had subsequently transferred one of its licenses to XYZ Company, a wholly-owned subsidiary, ABC Company would not have any additional money available to purchase its license, and XYZ Company would not have any additional money available to purchase its license. This option, however , is not intended to prohibit additional license transfers consistent with existing Commission rules.

65. We believe that this prepayment option fairly balances competing interests, while maintaining the fairness and integrity of our rules and auctions. We note that 30% of the down payments is equal to 3% of the net high bids and is consistent with the approach adopted previously for down payments.[145] Under our existing rules, an applicant is subject to a 3% payment if it fails to make the required down payment.[146] Furthermore, previously we have indicated that these payments will discourage default and ensure that bidders have adequate financing and that they meet all eligibility and qualification requirements.[147] In this manner, we believe it to be most fair to apply this provision to those licensees who seek the relief provided by this option. If licensees were able to use all of their down payment, they would recoup in full what they paid, and there would be no deterrent effect against bidding excessively in the auction or otherwise gaming the process. Thus, in the next auction to which our default payments apply, these rules could be ignored with impunity. Such a result

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[145] *See* BDPCS, Inc., BTA Nos. B008, B036, B055, B089, B110, B133, B149, B261, B298, B331, B347, B358, B391, B395, B407, B413, and B447, Order, 11 FCC Rcd 14399 (1996) (assessing a $67,695,653.23 default payment for failure to submit the required down payment for licenses won in the C block auction), *reconsideration denied*, *Order*, 12 FCC Rcd 6606 (1997); and C. H. PCS, Inc., BTA No. B347 Frequency Block C, Order, 11 FCC Rcd 22430 (1996) (assessing a $5,031,232.50 default payment for failure to submit the required down payment for one license won in the C block reauction).

[146] *See* 47 C.F.R. §§ 1.2104(g)(2), 24.704(a)(2). The defaulted bidder in this instance is subject to a payment equal to the difference between the amount bid and the amount of the winning bid the next time the license is offered by the Commission, plus a payment equal to three percent of the defaulted bid price. *See* 47 C.F.R. § 24.704(a)(1), (2). *See also*, *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd 4495 at n.51.

[147] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2383.

would severely harm our market- based auction program. It would make it impossible to impose the charges we already have imposed in past cases, including in C block cases.[148] Further, we emphasize that permitting C block licensees access to the down payments they previously made for licenses they no longer wish to retain is a substantial benefit and fair to these licensees. To allow them to use 100% of those funds would be unfair to other C block licensees who choose to continue to pay under their existing obligations, and to bidders who were unsuccessful in the auction.

66. While some have argued that C block licensee loan payoffs made under a prepayment plan should be determined using a net present value formula, we decline to discount the Notes. We believe it is fair to other bidders and to the credibility and integrity of our rules for the prepayment to be in the amount of the outstanding debt for the net high bid. In other words, licensees should pay what they bid. To offer deep discounts off the amount of the debt is outside normal commercial practices and otherwise appears to be a "bail-out" of C block licensees who have encountered financial difficulties long after the auction was completed and the financial commitments were made. Debt paid off in advance of the maturity date allows the debtor to reap the benefit of not incurring additional interest due on the principal amount owed. To discount the amount of the principal, as has been suggested, would unfairly permit a windfall to the licensee electing this option. While we are cognizant of the financial difficulties for some C block licensees, we are also mindful of our duty to the other C block licensees who are successfully meeting their obligations and continuing build-out efforts for wireless services. Therefore, we believe that we strike the proper

[148] *See* n.145, *supra*.

balance by allowing a licensee the benefit of prepaying its debt obligations, thereby reducing the amount of interest that would be payable over the full term of the Note, while avoiding fundamental changes to our rules that unfairly harm other licensees who followed our rules and who continue to meet their payment obligations.

67. Under this prepayment option, an incumbent must prepay all of the BTA licenses in a particular MTA and cannot arbitrarily select individual BTA licenses in a given MTA to prepay while surrendering other licenses in that MTA, with one exception. We conclude that while a licensee must prepay the debt on all of the BTAs for which it holds licenses in an MTA, we recognize that a licensee may not have sufficient funds available to it to prepay all of its Notes for the BTA licenses in a given MTA. Therefore, any licensee that has enough funds on hand to prepay one or more BTAs within an MTA, but not enough for the entire MTA, must prepay all of those BTAs within that MTA that it can afford. We conclude that a requirement that all licenses in a given MTA be prepaid precludes licensees from "cherry picking." The simultaneous multiple-round auction design discussed in paragraphs 86-89, *infra*, enables bidders to place bids on many licenses at once. If we were to permit licensees to "cherry pick" which licenses in an MTA to prepay and which to surrender under this option, the interdependency of the licenses would be threatened. Licenses surrendered pursuant to such a "cherry picking" scheme would lack the potential for aggregation, and consequently would hold much less value to other bidders in the subsequent reauction.

68. We decline to provide an exception for markets in which the five-year build-out requirement has been met as provided under the amnesty option. Under the prepayment

option, licensees have the flexibility to select which markets they will retain subject to the restrictions in paragraph 67, *supra*. For this reason, licensees have the option of selecting and prepaying for licenses where they have invested capital to meet the build-out requirements and not prepaying in an MTA where they have not. We believe that this flexibility, compared to the all or nothing approach of simple amnesty, mitigates the need for this exception.

69. Finally, for a period of two years from the start date of the reauction, licensees (defined as qualifying members of the licensee's control group, and their affiliates) will be prohibited from reacquiring the licenses surrendered pursuant to this option either through a reauction or any other secondary market transaction. We do not believe that it would be fair to other licensees and bidders for these licensees to benefit from a reauction of those licenses after taking advantage of this option. Furthermore, we do not believe that this option should provide opportunities for licensees to "selectively" reduce their license obligations by surrendering a license in hopes of re-obtaining it in a reauction at a lower price.

E. Election Procedures

70. We conclude that a licensee electing to continue under its existing installment payment plan or electing one of the options set forth in this *Second Report and Order*, must file a written notice of such election with the Wireless Telecommunications Bureau on or before the Election Date ("Election Notice") as specified in this section. As used herein,

"Election Date" means January 15, 1998.[149]

71. We require that those licensees electing (i) to continue making payments under their original C block Notes, (ii) the disaggregation option, or (iii) the amnesty option who elect to take advantage of the build-out exception and retain certain of their licenses make the appropriate payment by March 31, 1998 (or by the end of the 60-day grace period allowed, see paragraph 25, *supra*), and execute any necessary financing documents pursuant to appropriate requirements and time frames established by the Bureau in order to continue to be eligible under the option chosen.

72. *Continuation Under Existing Note(s).* Any licensee that wishes to continue making installment payments in accordance with the terms of its original C block Note, must elect to do so by submitting the Election Notice of such election.

73. *Disaggregation.* For licensees electing the disaggregation option, the Election Notice must include (i) a list of all licenses being disaggregated, (ii) the original of all licenses being disaggregated, and (iii) all originals of the Notes and Security Agreements for those licenses being disaggregated for cancellation by the Commission. Upon acceptance of the Election Notice, the disaggregated spectrum will be deemed returned to the Commission.

74. *Amnesty.* For licensees electing the amnesty option, the Election Notice must include (i) a list of all licenses being

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[149] See paragraph 110, *infra*. The Wireless Telecommunications Bureau will provide more information concerning filing procedures in a subsequent public notice.

surrendered, (ii) if applicable, a statement indicating that it intends to avail itself of the build-out exception together with a list of those BTA licenses it intends to retain[150] and pertinent information concerning build-out pursuant to the Commission's rules,[151] (iii) the original of all licenses being surrendered, and (iv) all originals of the Notes and Security Agreements for those licenses being surrendered for cancellation by the Commission.

75. Prepayment. For licensees electing the prepayment option, the Election Notice must include (i) a list of all licenses being prepaid, (ii) a payment in the amount of any additional "new money" a licensee desires to apply to the prepayment of its licenses, (iii) the original of all licenses not being prepaid in accordance with this option, and (iv) all originals of the Notes and Security Agreements for those licenses not being prepaid for cancellation by the Commission. Notes which are prepaid will be marked "Paid-In-Full" and returned to the licensee.

76. We further conclude that any C block licensee that (i) fails to elect one of the options set forth, Section IV.A.-D., *supra* on or before the Election Date, or (ii) fails to elect on or before the Election Date to continue making payments under its original C block Note(s), or (iii) fails to fully and timely execute and deliver to the Commission (or its agent) any required financing documents within the period of time specified by the Bureau, will not be afforded the opportunity granted to licensees who do make a timely election to repay the

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[150] Those licensees electing to proceed under the build-out exception will be required to adhere to the specific obligations set forth in their Notes and Security Agreements, as modified for those licenses not being surrendered to the Commission. *See* discussion in Section IV.E., *supra*.

[151] 47 C.F.R. § 24.203(c).

Suspension Interest over a period of eight equal payments. In such event, the licensee will be required, on or before March 31, 1998, to make all payments that would have been due under its Note(s) but for the effect of the *Suspension Order*. For example, a licensee whose regular installment due date was March 31, 1997, who did not make payment on that date because of the *Suspension Order*, will owe on March 31, 1998, all payments that were due and payable earlier, but unpaid due to the *Suspension Order*, in addition to the regularly scheduled March 31, 1998, payment.

F. Cross Defaults

77. *Background*. In the *Notice of Proposed Rule Making* in this proceeding, we sought comment on whether the Commission should cross default its installment payment plan loans with other installment payment plan loans to the same licensee.[152] We asked if we should cross default licensees across services or blocks (*e.g.*, from PCS licenses to SMR licenses, or from PCS C and F block licenses), whether we should pursue default remedies against single licenses only (*e.g.*, from C block to C block licenses only), and what factors should influence our decision to pursue cross defaults. In response, several commenters specifically requested that the Commission clarify its rules regarding cross default in the context of defaults on installment payments if licenses are held by licensees with the same or overlapping control groups.[153]

78. Further, several commenters request the Commission

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[152] *See Part 1 Proceeding* at pp 76-78.

[153] *See, e.g.*, ClearComm Reply Comments at 4; BIA Capital Comments at 4.

to affirmatively decide that there will be no cross default.[154] BIA Capital states that one perceived disincentive to providing financing to C block licensees is cross default.[155] In this regard, BIA Capital suggests that the Commission quickly clarify its position on cross defaults, and recommends that a default on payments for some licenses not result in cross default on other licenses which the company is using successfully.[156] ClearComm agrees and urges the Commission to allow licensees to place their licenses in separate entities so that potential financiers may invest in specific markets that meet their investment criteria.[157] AmeriCall and Hughes Network Systems state the effectiveness of the disaggregation option can be assured if the Commission clarifies that it will not pursue cross defaults.[158] AmeriCall and Hughes Network Systems state most regional equity funds are unwilling to look at this sector until they are reassured that their investment in one state is sheltered from events in other states that would impact licenses in those different markets.[159]

79. *Discussion.* We will not pursue cross default remedies against C block licensees who default on installment payments with regard to other licenses in the C or F blocks. For example, if a licensee defaults on a C block license and that licensee holds other C block licenses on which it is making its

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[154] *See, e.g.*, AmeriCall *ex parte* letter, July 11, 1997; Magnacom *ex parte* letter, August 13, 1997.

[155] BIA Capital Comments at 4.

[156] *Id.*

[157] ClearComm Reply Comments at 4.

[158] AmeriCall and Hughes Network Systems, Inc.,*ex parte* letter, September 16, 1997 at 2.

[159] *Id.*

payments, we will not declare it to be in default on its debt associated with the other C block licenses. Similarly, if a licensee defaults on a C block license, and also holds F block licenses on which it is making its payments, we will not declare it to be in default on its F block debt.

80. This decision is warranted in light of our efforts to provide current C block licensees who are experiencing financing difficulties with options for meeting their financial obligations to the Commission.[160] We emphasize that our decision only addresses the context of a licensee's default on an installment payment for a C block license upon other licenses held by that licensee in the C or F blocks. We defer to completion of the Part 1 Rule Making our decision on whether to amend more comprehensively our policy of cross defaults. We also emphasize that existing installment payment default rules and license conditions will continue to apply for those particular licenses in default after March 31, 1998. Accordingly, upon default, a license will automatically cancel and the Commission will initiate debt collection procedures against the licensee and accountable affiliates.[161]

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[160] This decision does not affect our policy with regard to defaults on first or second down payments. *See* Letter to Kenneth Hobbs from Michele C. Farquhar, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, DA 97-260 (rel. February 4, 1997). *See also* BDPCS, Inc. Emergency Petition for Waiver of Section 24.711(a)(2) of the Commission's *Rules, Memorandum Opinion and Order*, 12 FCC Rcd 3230 (1997).

[161] 47 C.F.R. § 1.2110(e)(4)(iii). *See also* 31 U.S.C. Chapter 37; 4 C.F.R. Parts 101-105; 47 C.F.R. Part 1, Subpart O.

V. FURTHER NOTICE OF PROPOSED RULE MAKING

A. Proposals Regarding the Reauction of Surrendered Licenses

81. *Background.* Several commenters suggest that a reauction of C block licenses in the best method by which the Commission can place C block licenses in the hands of licensees capable of constructing systems and offering service to the public rapidly. Triumph Capital, MCI, and Cook Inlet Communications all support a reauction within four to six months.[162]

82. *Discussion.* Under the options adopted above, licensees have three options for the surrender of licenses or spectrum to the Commission. A reauction of licenses will assure rapid provision of service to the public. A reauction also will ensure that these licenses are available to all applicants in a rapid and fair fashion. A simultaneous reauction of all the licenses turned in to the Commission will benefit all bidders because they will be able to bid for a number of licenses in a single reauction, instead of a series of piecemeal auctions after defaults and revocations, in which opportunities for aggregation might be less favorable.

1. *Licenses to be reauctioned*

83. We propose that the reauction include the following licenses: (1) all licenses representing the disaggregated spectrum surrendered to the Commission under the

[162] Triumph Capital *ex parte* letter, August 7, 1997 at 1; MCI *ex parte* letter, August 14, 1997 at 2-3; Cook Inlet Communications *ex parte* letter, August 5, 1997 at 3.

disaggregation option; (2) all licenses surrendered to the Commission on or before January 15, 1998, by incumbent licensees who choose to take advantage of the Commission's prepayment or amnesty options; and (3) all PCS C block licenses currently held by the Commission as a result of previous defaults. By including all available licenses in the reauction, the Commission can efficiently and fairly speed service to the public. In addition, offering all available licenses will allow for the most efficient aggregation of licenses. We seek comment on this proposal.

2. *Eligibility for Participation*

84. As we stated in the *Second Report and Order*, all entrepreneurs, all entities that applied for the original C block auction, and all current C block licensees with exceptions, are eligible to bid in the reauction. We seek comment on whether we should restrict participation in the reauction to entities that have not defaulted on any FCC payments.[163] Should we presume that an entity's prior default on payments for an FCC license or authorization makes that entity not financially or otherwise fit to acquire a reauctioned C block license? Alternatively, we could review financial qualifications through several other means. For instance, we could allow such entity to participate in an auction, but if the applicant is a winning bidder, set for expedited hearing the financial qualifications of the bidder, and allow the applicant to rebut a presumption that it is not financially qualified.[164] Another alternative would be to request that the entity submit more detailed financial information at the application stage, or require that the entity

[163] *See* 47 U.S.C. § 309(j)(5).

[164] *See* 47 C.F.R. §§ 24.832(e), 1.2108(d)(3).

submit a higher upfront payment amount (*e.g.*, a 50% upfront payment requirement) to participate in the reauction. With regard to C block licensees who elect the disaggregation, amnesty, or prepayment options adopted in the *Second Report and Order*, we observe that by making such election and related payments they are not in default on their C block licenses and, thus, would not be restricted from participation in the reauction (except as otherwise set forth in the *Second Report and Order*).

3. *Reauction Procedures*

85. We propose below auction design and application procedures for the reauction of C block licenses.

a. *Competitive Bidding Design*

86. We propose that all licenses and spectrum surrendered to the Commission be awarded by means of a simultaneous multiple-round electronic auction. We base this proposal on our desire to quickly auction available licenses and thereby to promote the most efficient assignment of the spectrum. Consistent with our normal practice, the specific procedural requirements of the auction would be set out by Public Notice prior to the auction. In general, we have indicated that the auction procedures chosen for each service should be those that will best promote the policy objectives identified by Congress.[165] We further concluded in the *Competitive Bidding Second Report and Order* that in most cases the goals set forth in Section 309(j) will be best achieved by designing auctions that award authorizations to the parties that value them most highly. As we explained, such parties are most likely to deploy new technologies and services rapidly, and to promote the

[165] 47 U.S.C. § 309(j)(3).

development of competition for the provision of those and other services.[166]

87. Also, multiple-round bidding during the auction will provide more information to bidders about the value of licenses than single round bidding. With better information, bidders have less incentive to shade their bids downward in order to avoid the "winner's curse," that is, the tendency for the winner to be the bidder who most overestimates the value of the item being auctioned.[167] Finally, multiple-round bidding is likely to be fairer than single-round bidding. Every bidder has the opportunity to win if it is willing to pay the most for it. Thus, we tentatively conclude that multiple-round bidding would be the best method of auctioning all available licenses and we seek comment on this tentative conclusion.

88. We also tentatively conclude that all surrendered C block licenses should be awarded in a single simultaneous multiple-round auction. A single simultaneous auction will facilitate any aggregation strategies that bidders may have, and it would provide the most information to bidders about license values at a time that they can best put that information to use. We seek comment on this tentative conclusion.

89. Finally, if we adopt simultaneous multiple-round bidding as our method of auctioning all available licenses, we tentatively conclude that bidding should be allowed only by electronic means, rather than by telephone. Given our desire to conduct the reauction quickly, as well as recent improvements in our electronic bidding software, we tentatively conclude that

[166] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2360.

[167] *Id.* at 2362.

telephonic bidding should be permitted only in exceptional circumstances, to be determined by the Wireless Telecommunications Bureau in each instance.

b. *Bidding Procedures*

90. Subject to the exceptions discussed below, which are designed to speed the reauction process, we tentatively conclude that the reauction should be conducted in conformity with the general competitive bidding rules set forth in Part 1, Subpart Q of the Commission's rules,[168] as revised,[169] and substantially consistent with the auctions that have been employed in other wireless services. We also propose to use our Part 24 rules applicable to the C block to the extent that such rules do not conflict with our Part 1 rules or rules specifically adopted or proposed in this *Second Report and Order and Notice of Proposed Rule Making* for the reauction of C block licenses. Specifically, except as set forth herein, we propose to apply the Part 1 rules regarding competitive bidding mechanisms,[170] bidding application and certification procedures and prohibition of collusion,[171] submission of upfront payment, down payment and filing of long-form applications,[172] procedures for filing long form applications,[173] and procedures

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[168] 47 C.F.R. Part 1, Subpart Q.

[169] We initiated a proceeding last February to revise our Part 1 rules. *See Part 1 Proceeding*.

[170] 47 C.F.R. § 1.2104.

[171] 47 C.F.R. § 1.2105.

[172] 47 C.F.R. §§ 1.2106, 2.2107.

[173] 47 C.F.R. § 1.2108.

regarding license grant, denial and default.[174] We seek comment on this proposal.

91. *Activity Rules*. We tentatively conclude that, as we have done in other simultaneous multiple-round auctions, we will conduct the reauction in three stages. Three stages, with bidders required to be more active in each stage, serves to provide bidders with the flexibility to pursue backup strategies as the auction progresses. However, because we believe that efficiently assigning these licenses for rapid service to the public and increased competition in the CMRS marketplace requires a swift reauction of the licenses, we propose to use high activity requirements in the reauction. In recent auctions, for example, we have required bidders to be active on 80% of their eligible licenses in Stage I, 90% in Stage II, and 98% in Stage III. We propose to use similar activity levels in the C block reauction and, to further expedite the auction, require the Bureau to use its delegated authority to aggressively schedule bidding rounds, quickly transition into the next stage of the auction when bidding activity falls, and use higher minimum bid increments for very active licenses. We seek comment on these proposals and tentative conclusions.

92. *Reserve Price, Minimum Opening Bid, and Minimum Bid Increments*. Section 1.2104 of our rules provides that the Commission may establish reserve prices or suggested minimum opening bids.[175] The Balanced Budget Act directed the Commission to prescribe methods by which a reasonable reserve price will be required or a minimum opening bid will be established, unless the Commission determines that a

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[174] 47 C.F.R. § 1.2109.

[175] 47 C.F.R. § 1.2104(d).

reserve price or a minimum opening bid is not in the public interest.[176] This legislative directive establishes a presumption in favor of reserve prices or minimum opening bids in the reauction. A minimum opening bid is the minimum bid price set at the beginning of the auction below which no bids are accepted. Customarily, an auctioneer has the discretion to lower a minimum opening bid in the course of the auction. A minimum opening bid in the C block reauction, more than a reserve price, will help make certain that the public is fairly compensated for spectrum surrendered to the Commission, expedite the auction and give us the flexibility to make adjustments based on the competitiveness of the auction. We seek comment on this proposal. We also seek comment on the methodology we should use to establish minimum opening bids and what factors we should consider in doing so. We propose minimum opening bids for each market equal to 10% of the corresponding high bid for the market in the original C block auction. Such an approach will scale the minimum opening bids in a way that reflects the relative value of the licenses. We also ask that commenters address whether the amount of the minimum opening bid should be capped to ensure that bidding is not deterred on high valuation markets, in particular. Finally, if commenters believe that a minimum opening bid equal to 10% of the high bid in the original C block auction will result in substantial unsold licenses, or is not a reasonable amount, they should explain why this is so, and comment on the desirability of a higher or lower minimum opening bid.

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[176] Balanced Budget Act of 1997, P.L. 105-33, 111 Stat. 251 (1997) (to be codified at 47 U.S.C. § 309(j)(4)(F)) ("Balanced Budget Act").

c. *Procedural and Payment Issues*

93. *Pre-Auction Application Procedures.* Auction applicants are required to file a short-form application, FCC Form 175, prior to the start of each auction.[177] Although we have previously allowed both electronic and manual filing of such applications, we tentatively conclude that we should require electronic filing of all short-form applications for the reauction. We believe that electronic filing of applications would serve the best interests of auction participants as well as the members of the public monitoring the reauction. We also believe that an electronic filing requirement will help ensure that the reauction will be completed within the time frame contemplated by this *Further Notice of Proposed Rule Making*. We have developed user- friendly electronic filing software and Internet World Wide Web forms to give applicants the ability to easily and inexpensively file and review applications. This software helps applicants ensure the accuracy of their applications as they are filling them out, and assists them in avoiding errors and omissions. In addition, by shortening the time required for the Commission to process applications before the auction, electronic filing will increase the lead time available to applicants to pursue business plans and arrange necessary financing before the short-form deadline. Our experiences from recent auctions show that bidders are confident that the electronic filing system is reliable. For example, in the broadband PCS D, E, and F block auction, 94% of the qualified bidders filed their short-form applications electronically. In the recently completed WCS auction, all winning bidders filed their long-form applications electronically. In addition, we note that in the *Part 1 Proceeding*, we tentatively concluded that Sections 1.2105(a)

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[177] *See* 47 C.F.R. §1.2105(a).

and 1.2107(c) of our rules should be amended to require electronic filing of all short-form and long-form applications.[178] We seek comment on this tentative conclusion.

94. *Upfront Payment.* The Part 1 rules require the submission of an upfront payment as a prerequisite to participation in spectrum auctions.[179] We propose to set the amount of the upfront payment for the reauction at $.06 per MHz per pop. We adopted the same upfront payment amount for our most recent broadband PCS auction, the D, E, and F block auction, in which all applicants for all blocks made a $.06 per MHz per pop upfront payment.[180] In the *Competitive Bidding Second Report and Order*, we indicated that the upfront payment should be set using a formula based upon the amount of spectrum and population (or "pops") covered by the license or licenses for which parties intend to bid.[181] We reasoned that this method of determining the required upfront payment would enable prospective bidders to tailor their upfront payment to their bidding strategies.[182] At the same time, however, we noted that determining an appropriate upfront payment involved balancing the goal of encouraging bidders to submit serious, qualified bids with the desire to simplify the bidding process and minimize implementation costs imposed on bidders.[183] We concluded that the best approach would be to maintain the flexibility to determine the

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[178] *Part I Proceeding* at p 46.

[179] *See* 47 C.F.R. § 1.2106.

[180] 47 C.F.R. § 24.716(a)(1).

[181] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2377-78.

[182] *Id.* at 2377.

[183] *Id.* at 2378.

amount of the upfront payment on an auction-by-auction basis because this balancing may yield different results depending upon the particular licenses being auctioned.[184] In light of the our desire that only serious, qualified applicants participate in the reauction, our proposal of a $.06 per MHz per pop is appropriate. We seek comment on this proposal. We also seek comment on alternative methods of establishing an upfront payment, and in particular, on how the Commission may estimate the present market value of the spectrum to be auctioned.

95. *Down Payment and Full Payment.* Consistent with the procedures used in prior auctions, we tentatively conclude that every winning bidder in an auction should be required to tender a down payment sufficient to bring its total amount on deposit with the Commission up to 20% of its winning bid within 10 business days after the issuance of a public notice announcing the winning bidder for the license.[185] We seek comment on this tentative conclusion.

96. If a winning bidder makes its down payment in a timely manner, we propose that it file an FCC Form 600 long-form application and follow the long- form application procedures in Section 1.2107 of the Commission's rules.[186] After reviewing the winning bidder's long-form application, and after verifying receipt of the winning bidder's 20% down payment, the Commission would announce the application's acceptance for filing, thus triggering the filing window for petitions to deny. We note that the Balanced Budget Act of

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[184] *Id.*

[185] *See* 47 C.F.R. § 1.2107(b).

[186] *See* 47 C.F.R. § 1.2107. *See also*, 47 C.F.R. § 24.707.

1997 authorizes the Commission to establish a shortened period for the filing of petitions to deny.[187] In light of this authority, as well as our desire to conclude the reauction process as quickly as possible, we propose that parties then have 15 days following public notice that an application was accepted for filing to file a petition to deny. If, pursuant to Section 309(d) of the Communications Act, the Commission dismisses or denies any and all petitions to deny, the Commission would announce by public notice that it is prepared to award the license, and the winning bidder would then have 10 business days to submit the balance of its winning bid. If the bidder does so, the license would be granted. If the bidder fails to submit the required down payment or the balance of the winning bid or the license is otherwise denied, we would assess a default payment as discussed below. We seek comment on these proposals.

97. *Amendments and Modifications of Applications*. To encourage maximum bidder participation, we propose to allow applicants to amend or modify their short-form applications as provided in Section 1.2105.[188] In the broadband PCS context, we modified our rules to permit ownership changes that result when consortium investors drop out of bidding consortia, even if control of the consortium changes due to this restructuring.[189] We propose to adopt the same exception to our rule prohibiting major amendments in the reauction. We seek comment on these proposals.

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[187] Balanced Budget Act.

[188] 47 C.F.R. § 1.2105.

[189] *See* Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Fourth Memorandum Opinion and Order*, 9 FCC Rcd 6858, 6868 (1994).

98. *Bid Withdrawal, Default and Disqualification*. We tentatively conclude that the withdrawal, default, and disqualification rules for the reauction should be based upon the procedures established in our general competitive bidding rules. With regard to bids that are submitted in error, we propose to apply the guidelines that the Commission has fashioned to provide for relief from the bid withdrawal payment requirements under certain circumstances.[190] We seek comment on this approach.

d. *Anti-Collusion Rules*

99. In the *Competitive Bidding Second Report and Order*, we adopted rules to prevent collusion in connection with competitive bidding, explaining that these rules, which are codified at 47 C.F.R. § 1.2105, would enhance the competitiveness of both the auction process and the post-auction market structure.[191] We propose to apply these same

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[190] *See* Atlanta Trunking Associates, Inc. and MAP Wireless L.L.C. Requests to Waive Bid Withdrawal Payment Provisions, *Order*, FCC 96-203 (May 3, 1996), and Georgia Independent PCS Corporation Request to Waive Bid Withdrawal Payment Provision, *Order*, DA 96-706 (May 6, 1996). *See also* Atlanta Trunking Associates, Inc. and MAP Wireless, L.L.C., Petition for Reconsideration of Bid Withdrawal Payment and Georgia Independent PCS Corp., Application for Review of Request to Waive Bid Withdrawal Payment Provision, *Memorandum Opinion and Order*, 12 FCC Rcd 6382 (1997) (waiving the full bid withdrawal payments assessed against these parties after a finding that the Commission's remote bidding system may have contributed to some confusion leading to the submission of the erroneous bids).

[191] *See* 47 C.F.R. § 1.2105(c). *See also Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2386-88; Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Second Memorandum Opinion and Order*, PP Docket No. 93-253, 9 FCC Rcd 7245, 7253-7254 (1994); *Erratum*, Mimeo No. 50278, 1994 WL 575828 (October 19, 1994).

rules to the reauction of licenses surrendered to the Commission. We seek comment on this proposal.

e. *Designated Entity Provisions*

100. We propose to provide small business bidders in the C block reauction with a two tiered bidding credit, which will provide a greater discount to very small businesses. In the C block auction, a winning bidder that qualified as a small business or a consortium of small businesses was able to use a bidding credit equal to 25% of its winning bid.[192] For the reauction, however, we tentatively conclude that we should offer tiered bidding credits, as we did for F block and, more recently, Local Multipoint Distribution Service (LMDS) small business bidders.[193] We propose to define a seconds tier of small business, which we will refer to as "very small businesses," as entities that, together with their affiliates and persons or entities that hold interest in such entities and their affiliates, have average gross revenues of not more that $15 million for the preceding three years. Creation of this subcategory of small business enables us to tailor a bidding credit to meet the needs of entities that may be interested in bidding on spectrum surrendered by C block licensees. Thus, we propose a 35% bidding credit for very small businesses and a 25% bidding credit for small businesses. We seek comment on our proposals and tentative conclusions.

101. We also tentatively conclude that an installment

[192] 47 C.F.R. § 24.712(a).

[193] *See* 47 C.F.R. §§ 24.717, 101.1107.

payment program will not be offered in the reauction.[194] We have conducted several auctions without installment payments. The Commission must balance competing objectives in Section 309(j) that require, *inter alia*, that it promote the development and rapid deployment of new spectrum-based services and ensure that designated entities are given the opportunity to participate in the provision of such services.[195] In assessing the public interest, we must try to ensure that all the objectives of Section 309(j) are considered. We have found, for example, that obligating licensees to pay for their licenses as a condition of receipt ensures greater financial accountability from applicants.[196] Thus, we tentatively conclude that we should not

[194] Section 309(j)(4) of the Communications Act states that the Commission shall, in prescribing regulations pursuant to these objectives and others, "*consider* alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods that promote the objectives described in paragraph (3)(B) . . . ." *See* 47 U.S.C. § 309(j)(4)(A) (*emphasis added*). *See also* Omnibus Budget Reconciliation Act of 1993, Report of the Committee on the Budget, House of Representatives, to Accompany H.R. 2264, A Bill to Provide for Reconciliation Pursuant to Section 7 of the Concurrent Resolution of the Budget for Fiscal Year 1994, May 25, 1993, at p. 255:

> While it is clear that, in many instances, the objectives of section 309(j) will be best served by a traditional, "cash-on-the-barrelhead" auction, it is important that the Commission employ different methodologies as appropriate. Under this subsection, the Commission has the flexibility to utilize any combination of techniques that would serve the public interest. H.R. Rep. No. 103-111 at 255 (1993).

[195] *See* 47 U.S.C. §§ 309(j)(3) and (4).

[196] *See* Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *Memorandum Opinion and Order on Reconsideration*, FCC 97-224, 62 Fed. Reg. 41225 (rel. July 10, 1997) ("800 MHz MO&O") at p 130.

extend installment payments to winners in the reauction, given the incentives to entrepreneurs established through the various proposals discussed above. We seek comment on these tentative conclusions.

VI. CONCLUSION

102. In this *Second Report and Order*, we order resumption of installment payments for the broadband PCS C and F blocks, with the payment deadline reinstated as of March 31, 1998. We also adopt options designed to assist C block licensees that are experiencing financial difficulties to build systems that will promote competition, or to surrender spectrum to the Commission for reauction. These options include disaggregation, amnesty, and prepayment. These provisions will create opportunities for C block licensees to provide service to the public while maintaining the fairness and integrity of our auctions program. We also adopt a *Further Notice of Proposed Rule Making* seeking comment on proposed changes to our C block rules to govern the reauction of surrendered spectrum in the C block.

VII. PROCEDURAL MATTERS AND ORDERING CLAUSES

A. Regulatory Flexibility Analysis

103. The Final Regulatory Flexibility Analysis, pursuant to the Regulatory Flexibility Act, 5 U.S.C. § 604, is contained in Appendix C. The Initial Regulatory Flexibility Analysis is contained in Appendix D.

B. Paperwork Reduction Act Analysis

104. This *Second Report and Order* contains a modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this *Second Report and Order*, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due December 1, 1997. OMB comments are due December 1, 1997. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

105. This *Further Notice of Proposed Rule Making* contains either a proposed or modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this *Further Notice of Proposed Rule Making*, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same time as other comments on this *Further Notice of Proposed Rule Making*; OMB comments are due 60 days from date of publication of this *Further Notice of Proposed Rule Making* in the *Federal Register*. Comments should address: (a) whether the proposed collection of

information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

C. Paperwork Reduction Act Comment Filing Procedures

106. Written comments by the public on the modified information collections in this *Second Report and Order* are due on or before December 1, 1997. Written comments must be submitted by OMB on the modified information collections on or before December 1, 1997. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, DC 20554, or via the Internet to jboley@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington, DC 20503 or via the Internet to fain_t@al.eop.gov.

107. Written comments by the public on the modified information collections in this *Further Notice of Proposed Rule Making* are due November 13, 1997. Written comments must be submitted by OMB on the modified information collections on or before 60 days after date of publication in the *Federal Register*. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 234, 1919 M Street,

N.W., Washington, DC 20554, or via the Internet to jboley@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington, DC 20503 or via the Internet to fain_t@al.eop.gov.

D. Ordering Clauses

108. Accordingly, IT IS ORDERED THAT, pursuant to Sections 4(i), 5(b), 5(c)(1), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 155(b), 156(c)(1), 303(r), and 309(j), this *Second Report and Order and Further Notice of Proposed Rule Making* is hereby ADOPTED, and Sections 1.2110 and 24.709 of the Commission's rules are amended as set forth in Appendix B, effective 60 days after publication in the *Federal Register*. The information collection contained in these rules becomes effective 60 days after publication in the Federal Register, following OMB approval, unless a notice is published in the Federal Register stating otherwise.

109. IT IS FURTHER ORDERED THAT the Wireless Telecommunications Bureau's *Suspension Order* dated March 31, 1997, suspending the installment payment obligations for Personal Communications Services (PCS) C block licensees, and the subsequent Public Notice dated April 28, 1997, suspending those obligations for PCS F block licensees are rescinded, effective March 31, 1998, and installment payments for C and F block PCS licensees are reinstated as of that date.

110. IT IS FURTHER ORDERED THAT on or before January 15, 1998, the Election Date, all C block broadband PCS licensees must elect either (1) to continue making payments under their original C block Notes, or (2) one of the options set forth in Section IV of this *Second Report and Order*. The Election Notice must be filed on or before January

15, 1998 with the Office of the Secretary, Federal Communications Commission, Washington, DC 20554 (Attn: Wireless Telecommunications Bureau, Auctions and Industry Analysis Division -- Election Notice).

111. IT IS FURTHER ORDERED THAT the Secretary shall send a copy of this *Second Report and Order and Further Notice of Proposed Rule Making*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with Section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

112. IT IS FURTHER ORDERED THAT, pursuant to 47 U.S.C. § 155(c) and 47 C.F.R. § 0.331, the Chief of the Wireless Telecommunications Bureau IS GRANTED DELEGATED AUTHORITY to prescribe and set forth procedures for the implementation of the provisions adopted herein.

E. Ex Parte Presentations

113. The *Further Notice of Proposed Rule Making* is a permit but disclose notice and comment rule making proceeding. *Ex parte* presentations are permitted, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

F. Comments

114. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **November 13, 1997**, and reply comments on or before **November 24,**

1997. In addition, a courtesy copy should be delivered to Mark Bollinger, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, 2025 M Street, Room 5202, Washington, DC 20554. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus ten copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, DC 20554.

G. Additional Information

115. For further information concerning the *Second Report and Order*, contact Jerome Fowlkes or Sandra Danner, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, Washington, DC 20554, (202) 418-0660. For further information concerning the *Further Notice of Proposed Rule Making*, contact Mark Bollinger, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, Washington, DC 20554, (202) 418-0660.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A
List of Commenters

Initial Comments

1. Airadigm Communications, Inc. (Airadigm)
2. ALLTEL Communications, Inc. (ALLTEL)
3. Alpine PCS, Inc. (Alpine)
4. AmeriCall International, L.L.C. (AmeriCall)
5. Bay Springs Telephone Company, Inc. (Bay Springs)
6. Bear Stearns
7. BellSouth Corporation
8. BIA Capital Corporation (BIA Capital)
9. Brookings Municipal Utilities (BMU)
10. Central Wireless Partnership (CWP)
11. Chase Telecommunications, Inc. (Chase)
12. ClearComm, L.P.
13. Comcast Corporation
14. Community Service Communications, Inc. (CSCI)
15. ComScape Telecommunications of Charleston License, Inc. (ComScape)
16. Conestoga Wireless Company (Conestoga)
17. CONXUS Communications, Inc. (CONXUS)
18. Cook Inlet Region, Inc., Cook Inlet Western Wireless, PV/SS PCS, L.P., Western Wireless Corporation, AirGate Wireless, L.L.C., Aerial Communications, Inc., TeleCorp, Inc., and Airadigm Communications, Inc. (collectively, CIRI)
19. Creative Airtime Services, L.L.C. (Creative)
20. Cyber Sites, L.L.C.
21. Dewey Ballantine
22. DiGiPH PCS, Inc. (DiGiPH)
23. Duluth PCS, Inc., St. Joseph PCS, Inc., and West Virginia PCS, Inc. (collectively, Duluth PCS)
24. Eldorado Communications, L.L.C. (Eldorado)

25. Fortunet Communications, L.P. (Fortunet)
26. General Wireless Inc. (GWI)
27. Holland Wireless, L.L.C., Wireless 2000, Inc., and Northern Michigan PCS Consortium, (collectively, Holland)
28. Horizon Personal Communications, Inc. (Horizon)
29. Indus, Inc.
30. Integrated Communications Group (Integrated)
31. Kansas Personal Communications Services, Ltd. (KPCS)
32. Ken W. Bray
33. Magnacom Wireless, L.L.C., PCSouth, Inc., and Communications Venture PCS Limited Partnership (collectively, Magnacom)
34. MCI Communications Corporation (MCI)
35. Meretel Communications Limited Partnership (Meretel)
36. MFRI, Inc.
37. Morris Communications, Inc. (Morris)
38. National Wireless Resellers Association (NWRA)
39. National Association of Black-Owned Broadcasters, Inc. (NABOB)
40. National Association of Black Telecommunications Professionals, Inc. (NABTP)
41. National Telephone Cooperative Association (NTCA)
42. Nextel Communications, Inc. (Nextel)
43. NextWave Telecom, Inc. (NextWave)
44. Northcoast Communications, L.L.C. (Northcoast)
45. Official Committee of Unsecured Creditors of Pocket Communications, Inc. (Pocket Creditors)
46. Omnipoint Corporation
47. OneStop Wireless
48. OnQue Communications, Inc. (OnQue)
49. PCS Plus L.L.C. and McKenzie Telecommunications Group, Inc. (collectively, PCS Plus)
50. Pioneer Telephone Association, Inc. (Pioneer)
51. Pocket Communications, Inc. (Pocket)

52. Point Enterprises, Inc. (Point)
53. R&S PCS, Inc. (R&S)
54. RFW, Inc.
55. Rural Telephone Finance Corporation (RTFC)
56. Small Business Coalition (SBC)
57. SouthEast Telephone Limited Partnership, Ltd. (SouthEast Telephone)
58. Southwestern Bell Mobile Systems (SBMS)
59. Spectrum Watch
60. Sprint Spectrum L.P.
61. Sprint Corporation
62. Tennessee L.P. 121 (Tennessee)
63. Toronto Dominion Bank and Toronto Dominion Securities (collectively, Toronto Dominion)
64. Urban Communicators PCS Limited Partnership (Urban Comm)

Reply Comments

1. Airtel Communications, Inc. (Airtel)
2. ALLTEL
3. Alpine
4. American Mobile Telecommunications Association, Inc. (AMTA)
5. Antigone Communications Limited Partnership and PCS Devco, Inc. (collectively, Antigone/Devco)
6. BellSouth Corporation
7. Carlson Technologies, Inc. (Carlson)
8. Cellexis International, Inc. (Cellexis)
9. ClearComm, L.P.
10. Comcast Corporation
11. Conestoga
12. CONXUS
13. CIRI

14. Duluth PCS
15. Fortunet
16. GWI
17. GTE Service Corporation (GTE)
18. Ken W. Bray
19. MCI
20. Millison Investment Management, Inc. (MIM)
21. Mountain Solutions LTD, Inc. (Mountain Solutions)
22. Nextel
23. NextWave
24. Northcoast
25. Omnipoint Corporation
26. OnQue
27. PCS Wisconsin, LLC
28. PrimeCo Personal Communications, L.P. (PrimeCo)
29. Radiofone PCS, L.L.C. (Radiofone)
30. R&S
31. RTFC
32. Sprint Spectrum L.P.
33. Stan P. Doyle
34. Telecommunications Resellers Association (TRA)
35. UniDial Communications (UniDial)
36. Urban Comm
37. U.S. Airwaves, Inc.
38. Wireless Nation, Inc.

Ex Parte Comments

1. AirGate Wireless, July 18, 1997
2. AirGate Wireless, July 22, 1997
3. AirGate Wireless, September 9, 1997
4. Alpine, September 17, 1997
5. Alpine, September 23, 1997
6. AmeriCall, July 11, 1997

7. AmeriCall, August 5, 1997
8. AmeriCall and Hughes Network Systems, Inc., September 16, 1997
9. AmeriCall, ClearComm, and Chase, September 17, 1997
10. BIA Capital, August 4, 1997
11. Chase, August 11, 1997
12. ClearComm, August 7, 1997
13. Congressman Rick Boucher, July 25, 1997
14. Congressman Richard Burr, August 11, 1997
15. Congressman Thomas Davis, July 30, 1997
16. Congressman John D. Dingell, September 16, 1997
17. Congressman Steny H. Hoyer, August 7, 1997
18. Congresswoman Sue W. Kelly, August 11, 1997
19. Congressman W.J. "Billy" Tauzin, August 13, 1997
20. Congressman W.J. "Billy" Tauzin and Edward J. Markey, September 16, 1997
21. CONXUS, August 27, 1997
22. Cook Inlet Communications, August 5, 1997
23. Cook Inlet Communications, August 15, 1997
24. Cook Inlet Region, Inc., September 23, 1997
25. El Dorado, August 13, 1997
26. GWI, August 4, 1997
27. GWI, August 15, 1997
28. GWI, August 18, 1997
29. Magnacom Wireless, LLC, August 13, 1997
30. MCI, August 14, 1997
31. NextWave, June 23, 1997
32. NextWave, July 29, 1997
33. NextWave, August 5, 1997
34. Nokia, September 15, 1997
35. Nokia, September 16, 1997
36. Northern Michigan PCS Consortium, L.L.C., August 14, 1997
37. Omnipoint Corporation, August 18, 1997

38. Omnipoint Corporation, September 3, 1997
39. Omnipoint Corporation, September 5, 1997
40. Omnipoint Corporation, September 23, 1997
41. R&S, August 11, 1997
42. Senator Christopher S. Bond, July 14, 1997
43. Senator Paul D. Coverdell, September 24, 1997
44. Senator Pete V. Domenici, September 10, 1997
45. Senators James M. Inhofe, Don Nickles, and Conrad Burns, August 7, 1997
46. Senator John McCain, August 19, 1997
47. Senator John McCain, September 18, 1997
48. Senator Daniel Patrick Moynihan, August 4, 1997
49. Triumph Capital, August 7, 1997
50. Triumph Capital, September 23, 1997 ("McCarthy Letter")
51. Urban Comm, August 21, 1997
52. Urban Comm, September 17, 1997
53. U.S. Small Business Administration, September 8, 1997 ("Glover Letter")

APPENDIX B
FINAL RULES

Part 1 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 1 - PRACTICE AND PROCEDURE

1. Section 1.2110 is amended by amending paragraph (e)(4)(i) to read as follows.

§ 1.2110 Designated Entities

(a) ****
(b) ****
(c) ****
(d) ****
(e) ***
(4) ***

(i) If an eligible entity making installment payments is more than ninety (90) days delinquent in any payment, it shall be in default, except that broadband PCS frequency block C licensees making the March 31, 1998, interest payment pursuant to their elections under the Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services Licensees, Second Report and Order, WT Docket No. 97-82 (rel. Oct. 16, 1997), shall be in default if they are more than sixty (60) days delinquent on such payment.

Part 24 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 24 - PERSONAL COMMUNICATIONS SERVICES

2. The authority citation for Part 24 continues to read as follows:

AUTHORITY: Secs. 4, 301, 302, 303, 309 and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 301, 302, 303, 309 and 332, unless otherwise noted.

3. Section 24.709 is amended by adding paragraph (b)(9) to read as follows.

§
24.709 Eligibility for licenses for frequency Blocks C and F.

(a) ****
(b) ***

(9) Special rule for licensees disaggregating or returning certain spectrum in frequency block C.

(i) In addition to entities qualifying under this section, any entity that was eligible for and participated in the first auction for frequency block C, which began on December 18, 1995, will be eligible to bid in a reauction of licenses for frequency block C conducted after March 31, 1998.

(ii) The following restrictions will apply for any reauction of frequency block C licenses conducted after March 31, 1998:

(A) Applicants that elected to disaggregate 15 MHz of spectrum from any or all of their frequency block C licenses, as provided in subsection IV.B., Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services Licensees, Second Report and Order, WT Docket No. 97-82 (rel. Oct. 16, 1997), will not be eligible to apply for

such disaggregated licenses until 2 years from the start of the reauction of those licenses.

(B) Applicants that surrendered any of their frequency block C licenses as provided in subsection IV.D. (the "prepayment option") Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services Licensees, Second Report and Order, WT Docket No. 97-82 (rel. Oct. 16, 1997), will not be eligible to apply for the licenses that they surrendered to the Commission until 2 years from the start of the reauction of those licenses.

(C) For purposes of this paragraph, applicant shall mean the applicant and its affiliates and any present or former qualifying member of a control group and their affiliates.

* * * APPENDICES C & D OMITTED * * *

Affirming and Dissenting Separate Statement
of
Chairman Reed E. Hundt

Re: C Block Financing Issues

The C block is the long-desired fifth wireless license: the third so-called PCS license to be added to the two outstanding cellular licenses. A half-dozen holders of the C block licenses for about two-thirds of the country by population are in financial distress and apparently unable to pay monies promised to the government by these licensees in a fair auction of the C block licenses. The question presented today is what should the FCC do as a creditor and a policymaker in this situation. For ten months I have been stating that the key policy goal in wireless is competition, not debt collection. However, it is also true that this Commission, as a creditor, ought to behave in a commercially reasonable manner. In America debtors who cannot pay are not thrown into prison, nor ought they be consigned to a Serbonian bog of Commission deliberation in which armies of lawyers and lobbyists and Commission staff are sunk. Yet for almost a year my colleagues on this Commission have been unwilling to make a commercially reasonable restructuring proposal of any kind to any of the financially troubled C block licensees. Nor have they been willing to promote competition by expediting some solution to the need to restructure and finance the C block.

Having this fifth license used in the marketplace is a longstanding goal of policy in this country; allowing it to be unfinanceable due to moralistic arguments against commercially reasonable structuring of debtridden licensees faced with unsolvable financial problems is inconsistent with all the wireless competition policies of this Commission and

the repeated public statements by all commissioners for many years. Today the Commission, after ten months of inaction in response to my repeated urgings, finally decides to take some significant steps consistent with the reasonable commercial practices of any debt holder and consistent with our oft-stated commitment to competition.

The Commission has a history dating back to 1993 of seeking to promote small business entrepreneurial activity in wireless with these C block licenses. This history included the current Commissioners' decision in 1994 to reallocate the PCS spectrum so as to make sure the C block licenses were of equal viability to the two other 30 MHz PCS licenses auctioned in 1994. Subsequently, the Commission designated the C block as an entrepreneur's block expressly to promote participation by small businesses and businesses owned by minorities and women. After the Supreme Court's *Adarand* decision, that plan had to be revised to eliminate provisions for minorities and women but the Commission retained its primary objective of providing entrepreneurial opportunities for small businesses. All current Commissioners supported this objective.

After the FCC successfully persuaded the Supreme Court to lift an appellate court stay, the C block auction began in 1995. To the dismay of many, some of the winners bid at levels far beyond apparently prudent ranges. Most did not; dozens of financially prudent bidders won at reasonable prices. But a handful of bidders submitted bids that cannot be explained other than by assuming they made their decisions according to erroneous market predictions, bad financial advice or a triumph of hope over thought. Regrettably, these bidders -- irrationally exuberant in hindsight and, according to many, even at the time of bidding -- won nearly three quarters of the United States market measured by population.

Some of these bidders have subsequently criticized the FCC's auction process and other FCC actions. None of this criticism has the slightest basis in fact. All amount to unworthy attempts to shift blame from the bidders to the auction conductor. Nothing about this history discredits auctions as a means of distributing licenses. Moreover, the installment payment and bidding credit plan that facilitated entrepreneurial entry into the C block in fact worked very well with respect to the majority of the licensees. More small business participation in wireless resulted from prudent bids in the C block than in virtually all other FCC license distributions in this decade.

However, the current situation, and indeed the situation for almost a year, has been that a handful of large C block licensees have been unable to attract sufficient financing to create viable businesses. These are at least Nextwave, Pocket, GWI, ChaseTel and ClearComm.

Unfortunately, all other C block bidders have their business futures occluded by the financial troubles of these large, financially troubled bidders. That is because Wall Street financiers are interested in seeing the build out of the entire block with the attendant possibilities for roaming that would be realized by complete buildout. In other words, the financial difficulties of the largest troubled bidders are in fact visited on otherwise financeable C block bidders.

Furthermore, the country's wise policy of encouraging wireless competition is hampered by the financial troubles of the C block. The sooner this block of licenses can be financed, the quicker we will see long overdue robust price and quality competition in wireless.

In addition, our decision not to adopt a single standard, and to permit competition among CDMA, TDMA and GSM, is also undercut by a failure to put the C block on reasonable financial footing. It is simply necessary to have at least three PCS firms operating in major markets to permit each of these technologies a fair chance to gain adherents.

I was aware last December that the market was unlikely to finance many of the largest bidders. That is why, in my year end statement entitled, "The Hard Road Ahead", I stated that "commercial lenders often reassess the terms of loans to address changes in the marketplace" and that C block licenses "perhaps . . . should be able to request renegotiation of their financing where it is necessary and appropriate to do so."

I made this suggestion because it is necessary for creditors, such as the United States in this situation, to act in a commercially reasonable manner. And it is necessary for the Commission to focus persistently on major policy goals and not to make the blunder of thinking that Congress has tasked us to attempt to maximize revenue from the C block auction. Here the goals are, as a matter of statute, not to maximize revenue from the C block, nor to punish debtors for their unwise bids, but rather we are commanded by Congress to promote competition, deployment of service and small business entry.

For the greater part of the last ten months my colleagues and I have disagreed over these objectives. They have focussed instead on questioning whether the largest licensees were really financially troubled, or they have evinced disinterest in the significance to consumers of these licensees' business prospects, or they have dwelled on the disappointment of other C block bidders who dropped out of the bidding in markets where price levels reached the heights now universally seen as

imprudent and unsustainable. Finally, they have expressed indifference to the risk of bankruptcy filings by the subject licensees, rather than negotiating restructuring of their debt according to market-based principles.

With perfect hindsight, had Congress written the law to state with inexorable clarity that the auctioning of wireless licenses does not suddenly make them property subject to bankruptcy jurisdiction, this latter point would be moot. Indeed, if tying up licenses in bankruptcy litigation were foreclosed as an option for a troubled C block licensee, then the Commission could simply retrieve licenses from defaulters, and reauction them to other small businesses. This is why I asked Congress this summer to amend the law to make clear that such action could be taken. No other commissioners joined me at that time. Powerful lobbying forces defeated my efforts. I am glad that, at least in recent days, all commissioners have joined this effort. However, responsible leaders in Congress have assured us that no such legislation is likely this year.

Pocket Communications, one of the largest C block licensees, is already in Chapter 11. An objective of the Commission therefore ought to be to compromise the Pocket litigation, as we have been advised by Sidley & Austin, Gordian Group, and many other experts. I had hoped that today's decision would offer a market-based compromise Pocket would accept. I have doubts that the decision today will accomplish that result.

Another objective ought to be to reach market-based compromises with the other troubled C block licensees that would at least roughly approximate results that could be obtained in bankruptcy settlements -- because that strategy would save the time and money expended trying to retrieve

unused licenses in bankruptcy.

I might be the only FCC commissioner in history who has actually litigated as an attorney for creditors in bankruptcy court. Normally this would be of small relevance to my job. However, from personal experience, as well as from the advice of our experts, I am quite confident that bankruptcy litigation can cause substantial delay even when the creditor's legal position is impregnable. That is the case here. Some debtor's attorneys have suggested that such issues as perfection of UCC-1's are a legal problem for the Commission. This is a frivolous assertion, that underscores the desperate ingenuity of a bankrupt firm's counsel but plays no role in our thinking or actions. Highly skilled outside counsel, Department of Justice lawyers, our own General Counsel's office, and my own personal experience all convince me beyond any doubt that we will prevail in bankruptcy court. But the process of bankruptcy litigation takes time and money. Meanwhile, the assets in question are, based on all advice, declining in value while lawyers talk and commissioners deliberate and lobbyists advocate. The reason is the lead time granted to the other licensees. If we truly want small business entrepreneurs to make use of the C block spectrum, we simply have to permit them to restructure their government debt or obtain the debtor's voluntary agreement to return the licenses quickly for prompt reauction. This is why it is so important for the Commission to make proposals that might obtain such agreement at least from some of the C block licensees. This action is overdue, and although the Commission may not have made a perfect decision today, some decision was better than none.

The test of any work-out plan for the financially-troubled C block licensees appears to be this: Does the plan avoid protracted bankruptcy, with the attendant costs of debtor and

creditor litigation, while also generally treating fairly the competing interests of the taxpayers, consumers, non-government creditors, equity holders and other interested parties?

Today we adopt at least one plan that is highly likely to obtain a voluntary and fair restructuring settlement agreement from several of the troubled bidders. I refer to the disaggregation plan, which allows licensees to return 15 Mhz of spectrum in return for a proportionate reduction in the amount of their outstanding debt. This will help small or rural area licensees who may not need the full 30 Mhz of spectrum to serve their markets. If long delayed, at least we are at last adopting this change in our rules.

The so called "amnesty" option we adopt today is also a good idea and I would have been happy to extend it to any licensee at any time. The problem of course is that it does not provide any incentives to the licensees' non- government creditors to consent to a return of licenses and therefore is not a workable solution. Congressman Dingell has told us that in his view "Giving licensees a choice between walking away from investments already made and facilities already constructed, or taking a chance in bankruptcy court, is tantamount to giving them no choice whatsoever." Nonetheless, I don't object to our decision to offer this as an option.

Another plan we considered including in our Order today had real promise for practical use -- the so-called "full price buy out plan." This plan, proposed originally by the bipartisan leadership coalition of Congressmen Markey and Tauzin, would have permitted a licensee to retain as many of its licenses as it could pay for in cash today (at net present value)

using the full amount of funds on deposit plus any additional sums it could immediately raise. Licenses that could not be paid for in this manner would be returned and reauctioned in exchange for discharge of the debt obligations associated with these licenses.

Unfortunately, the prepayment plan included in today's Order fails by a number of key measures to be consistent with the Markey/Tauzin suggestion and with good policy. I register my strong dissent as to this part of the Order.

First, it is questionable why a majority of Commissioners departs from the bipartisan consensus in Congress on this issue. Just two weeks ago, Senator Domenici wrote the Commission urging that we adopt a "comprehensive solution . . . [that would] put into productive use the spectrum." He also advised against pursuing "options that forestall the commercial application of Block C spectrum because of time-consuming and costly litigation resulting . . . from extended bankruptcy proceedings." This sentiment is also reflected in letters from Senator McCain received over the past six weeks. Likewise, Senators Inhofe, Nickles and Burns expressed their view in early August that "debt restructuring of the PCS licensees may be necessary to address the concerns that have been raised by the interested parties." Congressmen Markey, Tauzin and Dingell have each supported the full price buy out plan described above.

This correspondence makes plain Congress' direction that we adopt a workable, comprehensive plan for the C block. That is consistent with the statute. The Congressional mandate has not been adequately met by the Order we adopt today.

The Order requires licensees to forfeit 30% of their

deposits if they elect the "buy-out" option, even though this money has already been paid and would be used to purchase licenses at the price bid in the original C Block auction. That penalty is more than 50 times higher than any previous penalty in FCC history. The bipartisan view from Congress is that no such forfeiture should be imposed -- a difference which potentially represents hundreds of millions of dollars lost by incumbent licensees for reasons that bear no relation to the policy goals included in Section 309(j) of the Communications Act which granted the Commission's original auction authority. Today's Order also ignores the bipartisan conclusion of Congress that prepayment prices should be set based on "the net present value of the . . . prices for such licenses." Instead, the prepayment alternative ignores the time value of money and extracts an additional penalty from licensees on the order of several hundred million more dollars.

Second, the prepayment option we adopt today stands fundamentally at odds with basic principles of commercial reasonableness. By requiring licensees that elect the option to prepay their licenses at the "nominal" bid price, the plan ignores the time value of money and inflates the effective price paid by the licensees that it purportedly seeks to assist. Put simply, the value of a bid paid out over ten years is significantly less -- around 40% less -- than that same bid paid in cash. The consequence of this oversight is a massive penalty for any licensee that might otherwise elect this alternative. The prepayment option layers on an additional penalty by requiring licensees to forfeit 30% of their deposit. Note that this forfeiture of deposited monies is ordered even though the licensees would use their deposits to prepay licenses at effective prices higher than the amount that they bid. At base, the plan ignores fundamental principles of finance and, as a result, cannot reasonably be expected to appeal to licensees or

their creditors.

Third, the prepayment plan adopted today has too much risk of not being helpful to the financing of the licenses held by the very large bidders that constitute the vast majority of the C block licensed POPs in the United States. The acid test of any work out plan is whether the deal is accepted by the debtor; if not, the plan is not a work-out but rather only works us deeper into the toils of a drawn out bankruptcy litigation. In this case, the prepayment plan extracts the two extraordinary penalties described above and offers little in the way of incentives for licensees to accept it. According to the Congressional Budget Office Report, bankruptcies could cost consumers in excess of $5.5 in lost benefits. Taxpayers lose because the re-auction of licenses is conducted in a piecemeal fashion at the end of lengthy bankruptcy litigations, ensuring smaller proceeds as the value of the licenses deteriorates from delay. Such are the costs of the Commission majority's sanctimonious rigidity.

The majority's unwillingness to adopt a comprehensive plan for addressing the financial situation of the C block is inexcusable and inexplicable. The legacy of that decision is a substantial risk of bankruptcies that Congress and any commercially reasonable enterprise would have us eliminate. By focussing on punishment and ignoring the need to make the work-out "workable", the majority sacrifices consumer and taxpayer interests. This approach is fundamentally misdirected and contrary to our statutory directives. In short, today's decision will delay more competition for most Americans. Competition delayed is competition denied.

Finally, it is not clear to me that the parameters of our Order today and the accompanying Notice treat fairly those C block companies -- such as Omnipoint, Cook Inlet and

Airadigm -- that have accepted our challenge to bring service to market and who, as result, have invested heavily in build out. These licensees have operating businesses that are tied to specific C block licenses. Consequently, they do not have the same flexibility as other licensees to disaggregate or participate in a "full price buy out," which would require a dramatic reduction in the size of their existing service footprints. This concern with fairness is more than a metaphysics. These licensees must complete for capital in the public markets with other C block licensees, including winners of the subsequent re-auction. To the extent that such a re-auction of spectrum returned under any of the options in our Order today "resets" the market price for spectrum, it could impair access to capital for those licenses that are significantly built out but which carry artificially higher prices per pop.

The concerns I have identified do not subtract from the following facts:

1. After many months of discussion the Commission has finally recognized the need to restructure certain debt in the C block.

2. Today's decision will permit us to obtain some licenses for reauction and will permit some licensees to get financing, based on all available information.

3. And we have, at the very least, not simply extended the payment dates on the existing notes by the many years sought by some licensees. This proposal was unfair to the taxpayer and an unnecessary windfall to most C block licensees.

Therefore, I affirm in part and dissent with respect to the so-called "full price buy-out" plan.

Separate Statement
of
Commissioner Susan Ness

Re: Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82

A little over a year ago, we conducted an auction for the "C-block" PCS licenses. Like our other auctions, this auction was carefully conceived to operate on market-based principles, allowing licenses to be obtained by those who valued them most at prices to be set by free market mechanisms. It was also crafted to fulfill a Congressional mandate to bring "designated entities" -- especially small businesses, often owned by women and minorities -- into the marketplace. And it did.

I supported our commitment to market-driven auctions and to designated entities. I reaffirm that commitment today.

Our auction was conducted properly, our rules were clear, and numerous licensees stand ready to meet their payment obligations fully and on time. And while it is truly unfortunate that a handful of bidders overbid and/or overleveraged, it is clearly not our responsibility to prevent them from failing in the marketplace, or from going into bankruptcy. It is our responsibility to manage the spectrum, including the auction process, with *fairness and integrity*.

Although I sincerely regret that some licensees now find themselves unable to meet their commitments, I remain unpersuaded that the FCC should alter the outcome of the auction by providing bidders vastly more favorable terms than

those to which they previously agreed. To grant overly generous accommodations to certain C-block licensees, after the auction, would be to forsake the marketplace and return to the government picking winners and losers. I do not think that this should be our spectrum policy for the future.

Such a result also would be unfair to those C-block licensees that counted on us to enforce our rules; unfair to disappointed C-block bidders who dropped out of the auction when the licenses they desired became too expensive; unfair to licensees in other spectrum blocks who are offering competing services; and unfair to the U.S. taxpayer.

I do support, however, modest options that would facilitate the return of spectrum and reauction in a timely and fair manner. The menu of options we offer to all C-block licensees today provides an appropriate balance.

Clear Rules; A Fair Auction

Everyone participating in the C-block auction was subject to the same rules. The auction was run fairly. Even now there are no serious complaints about our conduct of the auction or the clarity of our rules.

Our rules were designed, as Congress intended, to create opportunities for small businesses. Eligibility to bid was limited, and favorable payment terms were available. While we offered licensees the opportunity to pay for the licenses in installments, we were not a lender in the traditional sense: the payment terms were available to all small businesses without regard to their credit-worthiness or soundness of their business plans. First and foremost, we acted as a licensing agency and, as our rules clearly specified, the licenses were granted

conditionally.

Each license was conditioned upon timely payments according to a predetermined payment schedule, with the caveat that the license would automatically cancel if the payments were not made. The conditional interest granted is clearly noted on the face of the license itself, and in the relevant Commission rules and orders. (Indeed, the conditional nature of the license and the attendant penalties and loss of downpayment are duly acknowledged in at least one large bidder's public filings with the Securities and Exchange Commission.)

The Problem

The C-block auction resulted in licenses being won by a handful of large players -- each with license bids in excess of a billion dollars -- and a multitude of smaller players. Several of the largest winners paid well in excess of prices comparable to those paid by the A and B block licensees. Compounding the problem, some of these same large players have highly leveraged capital structures with debt/equity ratios as high as 10 - 1, tying their future to conducting a successful public offering. In contrast to the larger players, the majority of the C-block winners have smaller holdings, paid considerably less per pop for their licenses and/or had more prudent capitalization. For the most part, the smaller licensees do not appear to be in financial trouble.

Last spring, a handful of the largest winners requested relief from their obligations -- essentially to keep their licenses on more favorable terms than those they voluntarily agreed to just sixteen months ago. They were outnumbered by many smaller licensees who have not sought relief and who are ready to build out their markets.

Nonetheless, as the campaign for significant modifications won some support at the Commission, other licensees echoed the call, reflecting a natural desire to pay less should the Commission be willing to rewrite the terms of the agreement. The chorus transcended the C-block and has now spilled over into other radio services. Interest payments were temporarily suspended as of March 31, 1997, pending Commission consideration of what, if any, measures should be taken to assist financially troubled licensees.

Other interested parties include many small companies -- some of which failed to win any licenses and dissolved -- who feel the prices were unreasonably driven up by certain bidders during the auction. Many of the investors in these companies and in those C-block licensees currently meeting their obligations believe fairness dictates that defaulting parties forego their licenses, that the licenses be reauctioned, and that everyone have a fair chance to acquire the licenses in a subsequent auction.

Marketplace Disruption

We must, however, consider certain countervailing factors. The financial markets became unsettled subsequent to our suspension of C-block installment payments. Licensees with sound business plans have been enveloped by the cloud of marketplace uncertainty, and the flow of capital needed for continued build- out has been impeded. C-block licensees, to varying degrees, have plans on hold, as the financial community awaits the outcome of this proceeding.

The Commission must take action now to get the C-block of licensees back to business. While there has been a wide range

of proposals offered and considered, the one thing that almost all parties have agreed upon is that final resolution is needed immediately to enable rapid build-out and foster competition.

A Menu of Options

We adopt a menu of options that is likely to help many of the troubled licensees, without jeopardizing the principles of fairness and integrity that are essential to market-driven auctions. In developing these options, the majority of Commissioners have discarded proposals that would have fundamentally changed auction outcomes or created incentives for licensees to alter otherwise achievable business plans. In addition, we have avoided giving anyone a "thumb on the scales" in a subsequent auction.

Specifically, we are continuing the deferral of installment payments until March 31, 1998, making the total suspension period a full year. This resumption date ensures that all C-block licensees and prospective financial backers will have sufficient time to complete their deals. Some will also benefit from the access to foreign equity that is permitted, beginning January 1, 1998, under the recent WTO Agreement. (This is all the relief that was initially sought by one bidder that is now urging us to adopt a very substantial restructuring.)

All C-block licensees who do not choose one of the three following options will be expected to resume payments under their existing agreements. I hope and anticipate that the vast majority of successful bidders will proceed in this fashion.

The three options are:

First, under the amnesty option, licensees may forfeit *all* of

their licenses and their downpayments. In return, the Commission will (in coordination with the Department of Justice) approve forgiveness of their outstanding debt and cancellation of the additional penalties, including a deficiency payment (representing the difference between the net bid price and the price obtained in a subsequent auction), that otherwise would be due. The licenses will then be reauctioned.

Second, under the disaggregation option, licensees may return half of their spectrum in a given market or markets in exchange for a corresponding reduction of debt. This is consistent with our existing disaggregation rules, facilitates new spectrum-based competition in the marketplace, and better enables the cash flows of the licensees to service the significantly reduced debt. We will re-auction licenses for the 15-megahertz spectrum blocks that are returned under the same designated entity terms as apply to all other C- block licenses. Several of the largest licensees have endorsed this option.

Third, under the prepayment option, licensees may apply 70 percent of their downpayments from licenses they now choose to abandon and 100 percent of their downpayments for licenses they now choose to keep to pay for as many licenses at the original auction price as they can afford. This is a buy-out, not a bail-out. Again, returned spectrum will be re-auctioned under the same terms as apply to all other C-block licenses.

Rejected Options

We carefully considered and discarded other options. For example, our dissenting colleague would have offered vastly more generous buy-out options. His actions suggest that the prospect of a large licensee filing for bankruptcy must be avoided at all costs. I cannot agree.

Substantial Discounts: Under the approach advocated by the Chairman, the debt owed by the licensees would be drastically discounted -- a 40% haircut to the American taxpayer -- well below the prices that other, subsequently disappointed, bidders were clearly willing to pay. This would be replacing a market-based outcome with an FCC-directed outcome. I agree with the Chairman's prior statements that the market -- not the FCC -- should pick the winners and losers.

In my view, the price bid is the price bid. Bidders were not offered a cash versus credit price. The notes do not provide for prepayment discounts. If the FCC wanted to induce licensees to prepay, we would have included a prepayment schedule in our notes and rules. To the contrary, the favorable financing terms offered -- at an interest rate reflecting the cost of capital to the U.S. government -- were designed, in part, to induce designated entities to hold their licenses for a full ten years. This was consistent with Congress's stated goals to bring small business, including women and minorities, into the market -- on a sustained basis. Therefore a licensee would be unjustly enriched if it received the full ten year benefit of attractive financing without the burden of holding the license for the full term.

Use of All Downpayments: I also disagree with the Chairman that the C-block licensees should be permitted to "spend" 100 percent of their deposits from licenses they no longer want, to pay for licenses they *do* want. These funds have been paid to the U.S. Treasury and are not the licensees' to redeploy as they wish. That policy was clearly stated in our rules and documentation. Indeed, the Chairman reiterated that view in an April 30, 1997, speech to the Federal Communications Bar Association:

> Some say that the C-block licensees will not pay the total of their commitments to installment payments. If that is true, they will not hold the licenses any longer. But still the taxpayers will have received all the installment payments to that date, and we will reauction the licenses...

A buyer of an option to purchase a piece of property is not entitled to apply the price of that option to the purchase price of another property. If licensees were able to use 100 percent of their deposits to cherry-pick which licenses they want to keep and which they want to return, they would recoup in full what they paid and there would be no deterrent in future auctions against bidding excessively. Such a result surely would poison a market-based auction.

Moreover, we have repeatedly refused to allow defaulting licensees to recoup their downpayment -- not just in the C-block auction, but in other auctions. Again, the purpose is to ensure the integrity of the auction.

Nonetheless, to accommodate some of the troubled licensees, the majority has agreed to allow them to apply up to 70 percent of the downpayments on licenses returned and 100 percent of the downpayment on licenses kept toward payment for selected licenses. The remaining 30 percent of the downpayment on returned licenses equates to the 3% of bid price default penalty specified in our rules.

The Wireless Telecommunications Bureau has routinely assessed such penalties, including loss of downpayment, on

defaulting bidders.[1] It also have assessed similar penalties against defaulting auction winners in other spectrum bands. While the amount at stake for the largest C-block licensees is not insignificant, surely it cannot be the policy of the FCC that we grant generous breaks to the largest bidders while we strictly apply our rules -- including the penalty provisions -- to the smaller bidders.

Transferable Bidding Credit: Finally, the Chairman would have allowed licensees to return all licenses and then apply 100% of their downpayments as a transferable bidding credit in a subsequent auction. This option, too, was carefully considered and discarded as being grossly unfair to losing C-block bidders, and to those bidders who already have built out their systems and cannot risk returning their licenses. It would have put a "thumb on the scales" in the subsequent auction in favor of the defaulting bidders. Those who bid up the original auction would now be rewarded by receiving full use of their downpayments toward the same licenses, at presumably significantly lower prices with "use it or lose it" dollars, or to cash out through another bidder. No wonder this concept found few policy adherents.

Other Misconceptions

Declining value of the licenses: Clearly, it would be better if C-block licensees did not file for bankruptcy. As a former

[1] For example, in May, one C-block bidder, BDPCS, Inc., was assessed a $67.7 million penalty, which totals 7% of the face amount of its bids of approximately $873 million. *See* BDPCS, Inc., Order, 12 FCC Rcd 6606 (WTB, 1997). Another C-block bidder, C.H. PCS, was assessed an initial penalty for over $6.4 million. C.H. PCS Inc., Order, 11 FCC Rcd 22430 (WTB, 1996).

communications lender, I am painfully aware of the problems and timeframes associated with bankruptcy proceedings. Nonetheless, I do not share the view that the C-block spectrum is a declining value asset, or that if the licenses were tied up in protracted litigation, they would ultimately yield a small fraction of today's worth. Our PCS service rules are extremely flexible, allowing licensees to provide both fixed and mobile services. With changing technology constantly creating new services, there is every likelihood that demand for this spectrum will be there whenever the licenses are reauctioned.

Forestalled Competition: Nor do I believe that C-block licensees must build their systems now or consumers will suffer from lack of competition in mobile communications. Even if buildout of a substantial portion of the C-block licenses were delayed, consumers still have the benefit of competition from the A and B blocks, wide area SMR, and the PCS D, E, and F blocks, in addition to the two cellular licenses in each market. Consumers in many markets already enjoy a substantial reduction in rates as a result of PCS competition.[2] Moreover, licensees are obligated to have built their systems only by the fifth year. Thus even if bankruptcy were avoided, there is no guarantee that service would commence immediately.

I reject the argument that if we do not provide extraordinary relief to the largest C-block licensees, other C-block licensees will be stymied by lack of roaming opportunities for their

[2] The Yankee Group identifies over 40 markets that now have three wireless competitors and 10 markets with four competitors. It observes that pricing in competitive markets with at least one new PCS operator averages 18% lower than in markets with no PCS competitors. *Yankee Watch Mobile Flash -- Competition Begins to Have an Impact on Wireless Pricing (April 18, 1997).*

customers. The marketplace recognizes the problem, and has been working on a solution. Equipment manufacturers are helping to forge agreements that will enable the PCS equipment to roam nationwide, and new handsets operate on both cellular and PCS frequencies. I am confident that wireless telephone competition will not come to a grinding halt if there were a delay in the buildout of some of these licenses.

Conclusion

The FCC's primary responsibilities are to write fair rules, run fair auctions, and issue licenses to successful bidders. We have an obligation of fairness and impartiality to those who bid but chose not to overbid or overleverage. And we owe it to the C-block licensees who seek no special treatment but just want to get about their business to avoid changing the rules in any fundamental way that is detrimental to their business plans.

I believe the approach we adopt today fairly balances the competing interests. Restoring regulatory certainty to the marketplace promotes investment, competition, and service to the American public. Even though the approach we adopt today is the product of negotiation and compromise, and does not reflect the first-choice preferences of any individual Commissioner, I am satisfied that under present circumstances adoption of this order is the course of action that best serves the public interest.

SEPARATE STATEMENT OF COMMISSIONER RACHELLE B. CHONG

Re: Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services Licensees, WT Docket No. 97-82, Second Report and Order and Further Notice of Proposed Rulemaking

Introduction

Three years ago, we set up a series of new rules for the conduct of a historic auction, the first U.S. auction of spectrum for the purpose of providing Personal Communications Service (PCS). Our previous assignment methods of lotteries and comparative hearings were time-consuming, resource-intensive, and encouraged losing applicants to tie up the licenses in years of litigation. We believed that auctions would speed the development and deployment of new services to the public; encourage the efficient use of spectrum; and generally award licenses to those parties who value them most highly and who are thus most likely to introduce service rapidly to the public. Finally, auctions recovered for the public a portion of the value of the spectrum.[1] Thus, we firmly believed that the public interest would be served by having market forces, rather than regulators, decide who should be assigned licenses for the PCS spectrum. We also put our trust in market forces to determine which licensees would succeed and which would fail.

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[1] Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Second Report and Order*, 9 FCC Rcd. 2348, 2349-50 (1994).

Consistent with our statutory mandate under section 309(j),[2] however, we incorporated in our auction rules some special assistance to "designated entities," including small businesses, minorities, women, and rural telephone companies. After some unexpected delay caused by the release of the Supreme Court's Adarand decision,[3] this assistance was narrowed to apply only to small businesses. Because the main problem small business faced was access to capital,[4] we gave them a number of regulatory advantages to address this problem and to give them opportunities to succeed. These tools included a smaller down payment, installment payments and their own block (C Block) so they would not have to bid against larger, "deep pocket" companies.

Despite these advantages, some C Block licensees have found themselves in financial trouble. These licensees allege that the higher per pop[5] values they paid for their C Block licenses as compared to their counterparts in the A and B Blocks, together with alleged recent downturns in the wireless financial markets, have made it difficult for them to obtain financing. A number of C Block licensees have petitioned this Commission asking for relief. They have made impassioned pleas for very dramatic restructuring of their installment payment plans. Some have gone so far as to claim that if we do not restructure their debt, they will go into bankruptcy, pointing to one large C Block licensee who has already gone into bankruptcy.

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[2] 47 U.S.C. § 309(j).

[3] *Adarand v. Pena*, 515 U.S. 200 (1995).

[4] Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Fifth Report and Order*, 9 FCC Rcd. 5532 (1994).

[5] "Pop" is defined as prices per MHz per population.

Since the beginning of this debate, my initial reaction to these requests for relief was to turn them down. No one disputes that our rules at the time of the auction were clear. Every applicant knew exactly what would happen if a licensee failed to pay in a timely manner. In our rules and in the notes signed by the C block licensees, the Commission could not have been clearer that we granted these licenses subject to conditions. If a licensee failed to meet a condition, including making a timely installment payment, it would be in default; in such an event, the license would be returned to the Commission.[6]

Major Restructuring Requests

Regardless of these clear rules and executed financial agreements, some C Block licensees have asked us for dramatic restructuring, including up to a 70- 80% reduction of their debt or deferrals of all payments for a number of years. I believe it would be unwise for the Commission to agree to any such major restructuring. First, I believe that a major restructuring - or any other dramatic after-the-fact rule change designed to bail out every financially-troubled C Block licensee - harms beyond repair the integrity and credibility of our auction rules. Such a

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[6] I believe that our licensees reasonably should have expected the Commission to deny requests for relief. Even our dissenting colleague, who thinks that the relief we provide C Block licensees does not go far enough, has publicly stated that if defaults occurred, he would not hesitate to take back the licenses. *See* speech by Chairman Reed Hundt, "To Loop or Not to Loop: Is that the Question?" before the Cellular Telecommunications Industry Association (March 26, 1996) ("But I have heard that some bidders believe that the FCC will forgive the down payment due when the auction is over and even may forgive the principal payments which begin six years later. In the event that anyone knows anyone who thinks such thoughts, I have some advice you can pass on to them: Forget about it.")

major restructuring would make a mockery of our entire auction process.[7] In addition, I believe major restructuring would encourage speculation in any future auctions, because bidders may rely upon anticipated regulatory relief in making bids that are higher than prudence would warrant. Further, any major restructuring might also deter future investment because of the uncertainty caused by our regulatory actions. It is not just the integrity of our auctions rules that is at stake; if we were to permit major restructuring, we would head down a very slippery slope which could have dire consequences for the agency and all of its rules.

Second, I opposed any major restructuring because I felt that it would be inherently unfair to other bidders and licensees, including the following: (1) losing C Block bidders who made prudent bids in accordance with our rules but were outbid by those now in financial trouble; (2) rule-abiding C Block licensees who are promptly making their payments and building out their systems just the way Congress and the Commission wanted them to; and (3) other broadband and narrowband PCS licenses who are competing with the C Block licensees for financial support in the marketplace. These other bidders and licensees have expressed tremendous frustration and downright anger that the Commission would even consider breaching its duty to the American taxpayers and to our other licensees by changing our rules after the fact to give unwarranted relief to financially troubled C block licensees. These licensees are right -- every notion of fair play is violated by a bailout. If we go too far to help the financially troubled C Block licensees, we end up skewing the marketplace and rendering more serious

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[7] My dissenting colleague states that we have a "sanctimonious" attitude. Far from passing any moral judgments, my decisionmaking is based on the facts, the law, and notions of sound public policy.

harm to others who played by our rules.

The Menu Approach

It has been my consistent position that the wisest thing for us to have done was to decide quickly to enforce our rules. Having said that, some of my colleagues wished to go much farther. In the spirit of compromise and because I felt strongly that we needed to resolve the C Block question as quickly as possible,[8] I initiated the idea of a menu approach and agreed to

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[8] My dissenting colleague has characterized the majority of the Commissioners as being unwilling to act, or the cause of a ten month delay in reaching a resolution of the C Block issue. I wish to set the record straight. The first C Block request for relief was filed in March 1997, and the draft Public Notice putting out those requests for comment was not presented to the other Commissioners' offices until late May. Reply comments on the petition were due in July 1997, after which time the Staff drafted an item. Thus, given the pleading cycle, no action could have resulted before August. The notion that the Commissioners in the majority are somehow responsible for a ten month delay is ridiculous. Since August, the three Commissioners and our staffs have been deeply engaged in this issue, meeting with dozens of parties, talking with financial analysts and Congress members, reading dozens of *ex parte* filings, and consulting with bankruptcy counsel and the FCC Task Force. In truth, the only delay in this decision was caused by the Chairman, who, for about eight weeks, was wedded to an approach not favored by a single other Commissioner, and who refused to concede defeat. It was he who erected a number of procedural roadblocks in the way of a more timely item. Notably, when a majority of the Commissioners directed the staff in writing to prepare a draft item disfavored by the Chairman, he directed the staff to disregard our instructions, claiming that under Section 5(a) of the Communications Act, he is the "CEO" of the Commission and as such, is the sole person who may "coordinate and organize the work" of the Commission's staff. While Section 5(a) states that the Chairman may coordinate and organize the work of the Commission, he may do so only "in such a manner as to promote prompt and efficient disposition of all matters within the jurisdiction of the Commission." Clearly, the prompt and efficient disposition of the C block

compromise on the ultimate menu that we adopt today in order provide some modest and limited relief for troubled C Block licensees.

The Prepayment Option

Although I support the majority decision, I remain concerned that we may have gone too far, particularly with the prepayment option. I would have preferred not to include this option at all, or if so, to allow the parties to use only 50% of their deposits. Again, due to the need to get the proceeding concluded, and because I felt that the 70% figure was consistent with our rules,[9] I ultimately agreed to the majority's proposal. This proposal was, however, as far as I thought we could prudently go, without endangering the integrity and credibility of our rules.

My dissenting colleague makes clear that he would have preferred to allow the licensees to use 100% of the downpayment and to allow a discount on the net bid price to the net present value. I believe his proposal would have been bad public policy for a variety of reasons. First, I believe that it would have been unfair and commercially unreasonable for us to have discounted the face value of the notes to their net present value. It is clearly fair to other bidders and to the

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matter was not served by a Chairman who refused to allow the staff to draft a decision supported by a majority of the Commissioners. Having studied the legislative history of Section 5(a), I know that Congress did not intend for Section 5(a) to be a tool of the Chairman to defeat the basic structure of the Commission as a multi- member body, with majority rule and equal votes granted to each Commissioner.

[9] *See* 47 C.F.R. Section 1.2104(g)(2).

integrity and credibility of our rules for the prepayment to be in the amount of the note, i.e. to make the licensees pay what they bid. If we offered an arbitrary discount to net present value, then every C Block licensee -- even those who can pay what they bid -- would demand the same discount. Clearly, the loser would be the American taxpayer, and the culprit the agency that cannot abide by its own rules. Further, to offer deep discounts off the net amount of the debt is outside normal commercial practices. By allowing C Block licensees to pay off their debt in advance of the maturity date, we are allowing them to reap the benefit of not incurring additional interest due on the principal amount owed. To discount the amount of principal owed by C Block licensees would unfairly permit a windfall.

Second, I object to my dissenting colleague's characterization of our decision to allow licensees to use only 70% of their deposits (as opposed to 100%) as an unreasonable imposition of a "penalty." This is no penalty! The prepayment option is simply that -- an option. If a licensee wishes to continue to make installment payments under the terms of its agreement with the Commission, it may do so and all of the monies on deposit with the Commission will go to pay for the purchase of those licenses. Allowing parties to take deposits that were targeted for a specific market's license, aggregate those deposits and use them to buy other licenses for other markets is an enormous benefit that our rule abiding C Block licensees can't enjoy. Under our rules, no such aggregation is allowed; those monies on deposit would have been forfeited to the Commission if the installment payments were not made on each license. Thus, allowing a licensee to use any percentage of deposits for any license they return to the Commission is an enormous benefit; allowing licensees to use 70% of those deposits is downright generous.

Nor do I believe that our failure to adopt the Chairman's prepayment plan makes our C Block approach unworkable. As an initial matter, I do not agree that, as my dissenting colleague asserts, the acid test of our decision is how many licensees avail themselves of the options we set forth here today.[10] At the time we put in place our C Block auction rules, I expected there to be winners and losers. There will be some who may not have prudently bid or who are overcome by subsequent market events; I do not believe it to be the Commission's job to bail out every licensee who finds itself in financial trouble. This notion is inherently inconsistent with an auction and market forces process.

Further, I believe that the more modest relief we have adopted herein does provide some reasonable alternatives for financially troubled C block licensees. I am optimistic that our menu of options will be attractive to a wide range of licensees. Several of the options we presented have been specifically advocated by and supported by commenters.[11] We also have taken steps to make our option attractive to those who have built out their systems.[12] In addition, it appears from recent press reports, that our options may even be attractive to those licensees who are in bankruptcy.[13] A third party has petitioned

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[10] Indeed, if all parties took an option, it may be evidence that the proposal was too generous.

[11] Clearcomm, L.P., Americall International, L.L.C., and Chase Telecommunications, L.P. *ex parte* letter, September 17, 1997.

[12] Under each of the options, those who have built out have an opportunity to keep the licenses in those markets where they have built out -- subject to certain restrictions designed to prevent "cherry picking."

[13] Although, in general, I am loathe to comment on a pending litigation matter, because this matter was reported in the press and my dissenting colleague raises it in his dissent, I feel I may briefly discuss it here. I am,

the bankruptcy court in the Pocket bankruptcy matter, seeking to purchase Pocket's assets and resume its installment payments.[14] This development generally confirms the wisdom of my initial position that the best thing to do was to simply enforce the rules, and let the market work. In any event, this development supports the majority's belief that the options we have adopted are sufficiently attractive to encourage parties to invest in even the most troubled of C Block licensees.

Bankruptcy Concerns

It may well be, however, that our menu approach does not appeal to every licensee and that some C Block licensees will reject all the options and go into bankruptcy. This is neither a surprise to me nor a development that causes me any serious alarm. In fact, this is a risk I am willing to take. My dissenting colleague's statements to the contrary notwithstanding, it is not the Commission's job to bail out every C Block licensee. Some bidders simply made imprudent business decisions, and despite our desire to assist small businesses in starting wireless businesses, the Commission's C Block auction process only offered opportunities, not guarantees of success. Our job here is to make sure that the public interest is served. The decision we make today strikes the right balance between our responsibility to preserve the integrity and credibility of our rules and our obligation to be fair to all licensees -- including

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however deeply disappointed that my colleague, an experienced litigator, would see fit to include in his separate statement the advice of our bankruptcy counsel as to our conduct of pending litigation. Moreover, any implication that our counsel's advice supports only the Chairman's position is simply incorrect.

[14] "National Telecom Makes Unsolicited $1.5 Billion Bid For Pocket," Communications Daily, October 3, 1997.

those who are successful and those who find themselves in trouble.

Although I am not indifferent to the sad plight of the financially troubled licensees, or to the delays in service and costs to the Commission associated with a bankruptcy proceeding, I disagree with my dissenting colleague that we should make the threat of bankruptcy the key driver of our decision today. There are three main reasons for my view. First, bankruptcies are a normal activity of our commercial world and, in our role as lender, should be expected. In fact, since, as Commissioner Ness astutely noted, the Commission did not even check applicants' financial status as a traditional lender would have, it truly would have been extraordinary had there been no C Block bankruptcies. The Commission has litigated many a bankruptcy before, and I have full faith in our counsel to obtain the best result possible given our strong case.

Second, despite assertions by my dissenting colleague to the contrary, I do not think the presence of a C Block licensee as the "fifth competitor" in the market is the key to competition in the wireless industry. Even without a C Block licensee in all of the markets, competition in the wireless market will continue to flourish.[15] The combination of four PCS and cellular players, each with more than 25 MHz of spectrum, together with the D, E and F Block licensees, each with 10 MHz, and an enhanced SMR provider makes for a vibrant competitive mix. Nor do I believe that the whole C Block will fail if the largest competitors do not build out their systems immediately. When we declined to adopt a single technology standard for PCS, we left open the possibility that

[15] It is worth noting that our rules do not require PCS licensees to build out their systems in less than 5 years in any case. 47 C.F.R. § 21.930.

there would be situations where parties would have to roam on PCS blocks other than their own. Although a delay in the roll out of service by a third PCS competitor may make roaming agreements a bit more difficult to negotiate, with the recent advancements of dual mode phones, carriers will soon have four wireless systems on which to roam.

Finally, I disagree with my dissenting colleague's characterization of the C Block as "a wasting asset." If there is one thing that I have learned in my years in the dynamic wireless industry, it is foolish to try and predict the future. Spectrum and services once thought to have little value have often proven to be extremely valuable. For example, C Block spectrum -- which some knowledgeable parties thought would sell for significantly less than A and B block spectrum -- far outstripped those values. Although time to market is certainly one factor in determine the value of spectrum, I think the value of the C Block licenses in the future will depend on many factors, including developments in technology and the amount and type of other spectrum available for similar uses.

Conclusion

In sum, I support the majority's decision today with full confidence that we have made a wise and fair decision. I hope that the regulatory certainty that will flow from our menu approach will finally allow the C Block licensees to get back to the business of building out their systems.[16]

[16] It does seem fitting somehow that this Commission, who cut its first teeth on the PCS auction and service rules back in the summer of 1994, finish its term with yet another major PCS decision.

Federal Communications Commission FCC 97-413

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)
	)
Amendment of Part 1 of	) WT Docket No. 97-82
the Commission's Rules --	)
Competitive Bidding Procedures	)
	)
Allocation of Spectrum Below	) ET Docket No. 94-32
5 GHz Transferred from	)
Federal Government Use	)
	)
4660-4685 MHz	)

THIRD REPORT AND ORDER AND SECOND FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: December 18, 1997 Released: December 31, 1997

Comments Due: February 6, 1998
Reply Comments Due: February 17, 1998

By the Commission: Commissioners Furchtgott-Roth and Tristani issuing separate statements.

I. INTRODUCTION

1. In this *Third Report and Order*, we make substantive amendments and modifications to our general competitive

bidding rules for all auctionable services. These changes to our general competitive bidding rules are intended to streamline our regulations and eliminate unnecessary rules wherever possible, increase the efficiency of the competitive bidding process, and provide more specific guidance to auction participants. The changes also advance our auction program by reducing the burden on the Commission and the public of conducting service-by-service auction rule makings. In the *Competitive Bidding Second Report and Order* in PP Docket No. 93-253, we stated that we would "issue further Reports and Orders ... to adopt auction rules for each auctionable service or class of service,"[1] and we identified criteria that would govern our choice of service-specific auction rules and procedures, which may be found in Subpart Q of Part 1 of our rules.[2] Since adoption of the *Competitive Bidding Second Report and Order*, the Commission has completed 15 spectrum auction, adopting service-specific competitive bidding rules for each one.[3] Based on the experience we have gained from the completed auctions

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[1] Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348, 2360, p 68 (1994) ("*Competitive Bidding Second Report and Order* "), on recon., Second Memorandum Opinion and Order, 9 FCC Rcd 7245 (1994) ("*Competitive Bidding Second Memorandum Opinion and Order*").

[2] 47 C.F.R. §§ 1.2101 *et seq.*

[3] *See* 47 C.F.R. §§ 24.301-24.320 (narrowband Personal Communications Service (PCS)); 47 C.F.R. §§ 24.701-720 (broadband PCS); 47 C.F.R. §§ 90.901-90.913 (800 and 900 Specialized Mobile Radio (SMR)); 47 C.F.R.§ 95.816 (Interactive Video and Data Service (IVDS)); 47 C.F.R. §§ 100.71- 100.80 (Direct Broadcast Satellite (DBS)); 47 C.F.R. §§ 21.921-21.961 (Multipoint Distribution Service (MDS)); 47 C.F.R. ss 22.960-967 (Cellular Unserved); 47 C.F.R. §§ 25.101-531 (Digital Audio Radio Service (DARS); 47 C.F.R. §§ 27.1-27.325 (Wireless Communications Services (WCS)).

and the comments we have received from commenters,[4] we here adopt general competitive bidding rules to provide for a more consistent and efficient licensing process for all auctionable services.

2. In this Second Further Notice of Proposed Rule Making, we seek comment on additional issues relating to our general competitive bidding rules for all auctionable services, including ways in which the Commission might offer an effective installment payment program in the future. Finally, we seek comment on our proposal to supersede the rules for the auction of General Wireless Communications Services (GWCS) spectrum with the Part 1 rules adopted in this proceeding. We believe that these proposals will assist our efforts to simplify and streamline our regulations in order to increase the overall efficiency of the competitive bidding process.

II. EXECUTIVE SUMMARY

3. This *Third Report and Order* is intended to establish a uniform set of provisions for all auctionable services, which incorporates our experience to date and allows us to conduct

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[4] The Commission received 24 comments and 19 reply comments in response to Amendment of Part 1 of the Commissions Rules -- Competitive Bidding Proceeding, Order, Memorandum Opinion and Order and Notice of Proposed Rule Making, WT Docket 97-82, 12 FCC Rcd 5686 (1997) ("Notice"). Appendix A contains a list of full and abbreviated names of parties commenting parties. In addition, Appendix A contains a list of parties filing comments, reply comments and ex parte comments in response to a public notice seeking comment in this docket, "Wireless Telecommunications Bureau Seeks Comment on Broadband PCS C and F Block Installment Payment Issues," Public Notice, DA 97-82 (rel. June 2, 1997) ("Installment Payment Public Notice").

future auctions in a more consistent, efficient, and effective manner. More specifically, the *Third Report and Order* modifies and amends Subpart Q of Part 1 of the Commission's rules as follows:

Rules Governing Status as a Designated Entity

- Continues our practice of defining small business size standards on a service-specific basis so that we may take into account the characteristics and capital requirements of specific services in determining what size businesses should be eligible for bidding credits.

- Adopts, for all auctions in which special provisions are made for "designated entities"[5] of a certain business size, uniform definitions of "gross revenues" and "affiliate."

- Eliminates the use of installment payments for the 800 MHz Lower 80 and General Category channels services, and suspends the use of installment payments for other services to be auctioned in the immediate future. Indicates that the Commission intends to eliminate installment payments for the paging and 220 MHz services.

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[5] *See* 47 C.F.R.§ 1.2110(a). The Commission's rules define designated entities as small businesses, businesses owned by women or members of minority groups, and rural telephone companies. *See also* 47 U.S.C. ss 309(j)(4)(C), (D). After the Supreme Court's decision in Adarand Constructors v. Pena that federal measures awarding preferential treatment on the basis of race are subject to strict scrutiny, the Commission revised its designated entity provisions so that all designated entities must be small businesses. *See* Adarand Constructors v. Pena, 115 S. Ct. 2097 (1995).

- Provides for higher bidding credits, in lieu of installment payments, to encourage and facilitate the participation of designated entities in future auctions. Adopts schedules of bidding credits for which designated entities qualify (although in service-specific rule making proceedings we will continue to establish the appropriate size standards for each auctionable service).

- Modifies the unjust enrichment rule, Section 1.2111(c), which governs the payment of unpaid principal and accrued interest by existing licensees utilizing installment payments who seek to transfer or assign their licenses, to conform with the broadband PCS rules.[6]

Rules Governing Auction Application and Payment Issues

- Amends Sections 1.2105(a) and 1.2107(c) to require that all short-form and long-form applications be filed electronically beginning January 1, 1999, if feasible.[7]

- Amends Section 1.2105(b)(2) to provide a uniform definition of major amendments to FCC Form 175.

- Creates general ownership disclosure requirements to

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[6] *See* 47 C.F.R. ss 24.716(d), 24.717(c).

[7] Sections 1.2105(a) and 1.2107(c) were erroneously amended by the Order, Memorandum Opinion and Order and Notice of Proposed Rule Making in this docket. The Notice portion of the Order, Memorandum Opinion and Order and Notice of Proposed Rule Making only requested comment on these proposed amendments to the Commission's rules; the Commission did not intend to adopt the rule at that time. *See* Notice at p 46.

eventually allow auction applicants to submit ownership information for one auction that will be stored in a central database and updated as necessary for subsequent auctions, instead of requiring resubmission of ownership information on each short-form and long-form application.

- Affirms our policy of refunding upfront payments before the end of the auction to bidders that lose eligibility to continue in the auction.

- Amends Section 1.2104(g) to apply uniform default rules to all auctionable services and all auction designs.

- Amends Sections 1.2109(a) and 1.2110(e) to permit auction winners who have submitted a timely down payment to submit their final payments on the licenses which they have won 10 business days after the applicable deadline, provided they also pay an appropriate late fee.

- Modifies our rules applicable to licensees currently paying for their licenses in installments to provide for one 90-day non-delinquency period and one automatic 90-day grace period, subsequent to the current 90-day non- delinquency period, and institutes a late payment fee on overdue installment payments, which is similar to that contained in our rules for the broadband PCS F block.

- Clarifies that we will not pursue a policy of cross default, either within or across services, where licenses default on an installment payment.

Rules Governing Competitive Bidding Design, Procedure and Timing Issues

- Clarifies that under its general delegated authority, the Wireless Telecommunications Bureau ("Bureau") may seek comment on specific mechanisms relating to day-to-day auction conduct prior to the start, and during each auction, as required by the Balanced Budget Act of 1997.[8]

- Allows for "real time" bidding in simultaneous multiple-round auctions.

- Amends Section 1.2104, consistent with the Balanced Budget Act of 1997, to provide that the Bureau will seek comment on and specify a minimum opening bid and/or reserve price in future auctions, unless it determines that doing so is not in the public interest.

- Adopts for all auctionable services our broadband PCS rules governing bid withdrawal payments in the event of erroneous bids.

- Retains Section 1.2109(b) in its current form, which governs the Commission's options in the event a winning bidder defaults on its down payment.

- Modifies the attributable investor threshold of the anti-collusion rule, 47 C.F.R.§1.2105(c), to include controlling interests and/or holders of a 10 percent or

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[8] Balanced Budget Act of 1997, P.L. 105-33, 111 Stat. 251 (1997), to be codified in relevant part at 47 U.S.C.§ 309(j)(2)(E) and 309(j)(4)(F) ("Balanced Budget Act").

greater interest in the applicant and to permit an entity that has invested in an applicant that withdraws from an auction to invest in other applicants who have applied to bid in the same markets.

- Permits all auction winners to begin construction of their systems, at their own risk, upon issuance of a public notice announcing auction winners.

In this *Second Further Notice of Proposed Rule Making*, we seek comment on a variety of additional proposals relating to our general competitive bidding rules. Specifically, we seek comment on:

- Whether there is a compelling governmental interest that would justify the use of provisions for minority-owned businesses and "exceedingly persuasive justification" for provisions for women-owned businesses.

- Whether there are mechanisms that might further opportunities for rural telephone companies to provide spectrum based services.

- How the Commission might offer an effective installment payment program, while minimizing the concerns (e.g., licensee default or difficulty meeting financial obligations to the Commission) that have persuaded us to suspend the use of installment payments for now, and whether there are other provisions or mechanisms by which the Commission could encourage Section 309(j) designated entity participation in future auctions.

Whether to adopt a controlling interest standard, whether such a standard is sufficient to calculate size so that only those entities truly meriting small business status qualify for bidding credits, whether we should adopt our proposed rule, and whether alternate standards for attributing the gross revenues of investors and affiliates in an applicant would better meet our goals. We also seek comment on whether this proposed standard would be strengthened by imposing a minimum equity requirement (e.g., 15 percent) that any person or entity identified as controlling must hold. Alternatively, we ask whether we should not adopt a minimum equity requirement, but rather indicate only that an absence of equity would raise a question as to whether de facto control exists.

- Whether to supersede the competitive bidding rules previously adopted for GWCS with our Part 1 rules.

III. THIRD REPORT AND ORDER

A. Applicability of General Competitive Bidding Rules

4. *Background*. In the Notice, we proposed to apply the general competitive bidding rules adopted in this proceeding to all future auctions, to the extent possible.[9] In keeping with our goal of simplifying and streamlining the rule making process for all auctionable services, we sought comment on whether the rules adopted in this proceeding should supersede all existing, service-specific competitive bidding rules for future auctions. Specifically, we proposed that these rules would affect all

[9] Notice at p 18.

services that are subject to pending proceedings[10] and any services that have existing competitive bidding rules that might apply to licenses that have not yet been auctioned or that will be reauctioned. In the alternative, we sought comment on whether we should phase-in the applicability of the revised general competitive bidding rules, such that, at a minimum, initial auctions may be completed under the existing service-specific rules while later auctions in the same service would be conducted pursuant to the rules adopted in this proceeding. In addition, we asked whether we should subject licenses that are reauctioned (due to defaults or if no winning bidder is otherwise declared) to these revised Part 1 general competitive bidding rules in the event we decide that these rules will not

[10] *See* Implementation of Section 309(j) of the Communications Act - Competitive Bidding - Tenth Report and Order, PP Docket No. 93-253, 11 FCC Rcd 19974 (1996) (Interactive Video and Data Service (IVDS)); Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, Second Report and Order and Further Notice of Proposed Rule Making, 12 FCC Rcd 2732 (1997) ("Paging Second Report and Order and Further Notice of Proposed Rule Making") (Paging); Rule Making To Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5- 29.5 GHz Frequency Band, To Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service And for Fixed Satellite Services -- Petitions for Reconsideration of the Denial of Applications for Waiver of the Commission's Common Carrier Point-to-Point Microwave Radio Service Rules, Suite 12 Group Petition for Pioneer Preference, CC Docket No. 92-297, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making (rel. March 13, 1997) ("LMDS Second Report and Order") (Local Multipoint Distribution Service (LMDS)); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, Memorandum Opinion and Order on Reconsideration, FCC 97-224 (rel. July 10, 1997) ("800 MHz Memorandum Opinion and Order and Order on Reconsideration"), 11 FCC Rcd 22114 (1996) (800 MHz SMR).

supersede existing service-specific auction rules. Finally, we asked that to the extent commenters believe that service-specific rules should be maintained, they explain which ones and why.

5. *Discussion*. With some exceptions, we adopt our proposal in the Notice to apply the general competitive bidding rules adopted herein to all future auctions, regardless of whether service-specific auction rules have previously been adopted. Our Part 1 rules will apply to all auctionable services, unless we determine that with regard to particular matters the adoption of service- specific rules is warranted. As we indicated in the Notice, we have gained significant experience in the course of the 15 auctions conducted to date. In particular, we have found that much of our auction process can be standardized and that adopting service-specific rules for many aspects of the competitive bidding process is both unnecessary and confusing. We also find that conducting separate rule makings for each individual service often slows the delivery of service to the public because it results in regulatory delays before the licensing process begins. The majority of commenters addressing this issue agree,[11] emphasizing that the adoption of uniform auction procedures will (1) shorten the rule making process for future auctions by narrowing the issues on which the Commission must seek comment in service- specific rule makings;[12] (2) decrease

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[11] See, e.g., PageNet Comments at 2; CII Comments at 4-5; Airadigm Comments at 2; NTCA Comments at 1-2; AT&T Comments at 1-2; AMTA Comments at 1; Metrocall Comments at 3; NextWave Reply Comments at 2; AICC Reply Comments at 2; ISTA Comments at 3 and Reply Comments at 1.

[12] *See* PageNet Comments at 1-2; AT&T Comments at 1-2; AICC Reply Comments at 2.

uncertainty for auction participants;[13] (3) benefit small businesses because uniform rules are more easily understood and complied with, particularly by those with limited resources and those that participate in different auctions;[14] and (4) enable the Commission to develop a consistent body of law and precedent governing the auction process.[15]

6. The Balanced Budget Act expands the Commission's auction authority.[16] Section 309(j)(2) formerly stated that mutually exclusive applications for initial licenses or construction permits were auctionable if the principal use of the spectrum was for subscription-based services and competitive bidding would promote the expressed objectives. As amended, Section 309(j)(2) provides that, in cases of mutually exclusive applications, all spectrum is auctionable except licenses or construction permits for (1) public safety services; (2) digital television service given to existing broadcasters to replace their analog license; and (3) non-commercial educational or public broadcast stations.[17] In addition, the Balanced Budget Act authorizes the Commission to assign pending broadcast license applications filed before July 1, 1997 by means of competitive bidding pursuant to Section 309(j).[18] Because these legislative

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[13] *See* PageNet Comments at 1-2.

[14] *See* NTCA Comments at 2.

[15] *See* PageNet Comments at 7-8.

[16] *See* generally, Balanced Budget Act, Title III.

[17] Balanced Budget Act,§ 3002

[18] Balanced Budget Act,§ 3002(a)(3). Comment is currently being sought on the use of the Part 1 rules for the auction of this service. *See* Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Fixed Television Service Licenses, MM Docket No. 97-234, Notice of Proposed Rule

changes significantly increase the number of services that will be licensed by competitive bidding, we believe that adopting uniform competitive bidding rules for all auctionable services is even more necessary.

7. With limited exceptions, the rules we adopt today will not apply to the initial auction of licenses in the paging, 220 MHz, and Local Multipoint Distribution ("LMDS") services. The Commission previously adopted service- specific auction rules for the auction of these services.[19] We believe that this decision is in the best interest of prospective applicants for these auctions, who may have relied upon the service-specific rules previously adopted by the Commission in formulating business plans and making early efforts to obtain financing. As discussed below, however, we are retaining the discretion to use the revised general competitive bidding procedures adopted in this proceeding for any reauction of licenses in these services. We also note that while service-specific rules exist for the auction of the 220 MHz service, many of these rules are

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Making, FCC 97-397 (rel. November 26, 1997) ("Broadcast NPRM").

[19] *See* Paging *Second Report and Order* and Further Notice of Proposed Rule Making; Amendment of Part 90 of the Commission's Rules To Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, Implementation of Sections 3(n) and 332 of the Communications Act -- Regulatory Treatment of Mobile Services; Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Third Report and Order* and Fifth Notice of Proposed Rule Making (rel. March 12, 1997) ("220 MHz *Third Report and Order* and Fifth Notice of Proposed Rule Making "); Amendment of Part 90 of the Commission's Rules to Facilitate the Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93- 144, First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making, 11 FCC Rcd 1463 (1996); LMDS *Second Report and Order*.

similar, or refer to the Part 1 rules.[20] To apply the existing rules for the most part is also strongly supported by those commenters addressing the issue.[21] For example, AMTA states that the 220 MHz industry has encountered extraordinary delays in achieving regulatory certainty, and that amending or altering the auction rules for this service would create further uncertainty.[22] Consistent with our discussion below (*see* Section III.E.4), our decision regarding the establishment of minimum opening bids will apply to the initial auction of licenses in the paging and 220 MHz services. In addition, we note that several petitions for reconsideration are pending in these proceedings. In resolving these petitions, the Commission will address installment payment financing for licenses in these services in a manner consistent with our decision herein to temporarily suspend the use of installment payments.

8. Many of the commenters who support our proposal to adopt general competitive bidding procedures for all auctionable services argue that the Commission should, in its discretion, adopt or retain service-specific rules in particular instances.[23] Airadigm argues that the Commission should use existing service-specific rules where it would be unfair to allow

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[20] See, e.g., 47 C.F.R.§ 90.1001.

[21] See, e.g., Nextel Comments at 2 and Reply Comments at 2; AMTA Comments at 4-5. The Commission received similar comments requesting that the rules adopted in this proceeding not be used for the initial auction of licenses in the 800 MHz service. *See* Nextel Comments at 2 and Reply Comments at 2. Because the 800 MHz auction closed on December 8, 1997, this issue is moot.

[22] AMTA Comments at 4-5.

[23] AT&T Comments at 1-2; AICC Reply Comments at 2; Airadigm Reply Comments at 6; NextWave Reply Comments at 2.

one group of licensees in the same service to benefit or be disadvantaged by operating under a different set of rules than its competitors in the same service (e.g., in the case of a reauction of licenses following bidder default).[24] Similarly, NextWave contends that the adoption of service-specific rules may be appropriate in some circumstances.[25] In a related argument, some commenters believe that, in certain instances, the rules adopted in this proceeding should not be applied retroactively to supersede previously adopted service-specific rules.[26] For example, AirTouch and WWC suggest that when service-specific rules have been adopted after industry participation and based upon particular characteristics of a specific industry or spectrum to be auctioned, those service-specific rules should govern.[27]

9. With regard to the auction of licenses to provide paging services, AirTouch opposes the Commission's proposal to apply general auction rules to all future auctions, regardless of whether service specific rules have been adopted.[28] AirTouch argues in particular that the Commission should not adopt a general stopping rule for the paging auction which would be contrary to the comments received in that proceeding and the stopping rule that the Commission ultimately adopted.[29] As discussed above, the Commission will use previously-adopted,

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[24] Airadigm Reply Comments at 6.

[25] NextWave Reply Comments at 2-3.

[26] *See* PageNet Comments at 7-8; Airadigm Comments at 2; PCIA Comments at 2, Merlin Reply Comments at 7; ISTA Reply Comments at 1-2; AirTouch Reply Comments at 4-5; WWC Reply Comments at 1.

[27] AirTouch Reply Comments at 4-5; WWC Reply Comments at 1.

[28] AirTouch Reply Comments at 4-5.

[29] *Id.*

service-specific rules for the paging auction.

10. The rule changes we adopt today streamline and simplify our general competitive bidding procedures. The majority of the rules we adopt today address aspects of our spectrum auction program that affect future auction applicants only. These rules include application procedures (e.g., electronic filing, short-form application amendments, ownership disclosure requirements), upfront and down payment issues, issues relating to competitive bidding design, procedure and timing (e.g., alternate bidding methodologies, minimum opening bids, and bid withdrawal), and rules prohibiting collusion during the auction. However, some of the provisions we adopt today address aspects of our rules that govern current licensees as well. Specifically, these minor rule changes affect certain license-related payment terms (e.g., installment payments, grace periods, and unjust enrichment).

11. Two commenters, AICC and AAA, argue that the general competitive bidding procedures adopted in this proceeding would be wholly inappropriate for auctions of shared frequencies governed by Part 90 of the Commission's rules.[30] In support of this position, these commenters argue that: (1) none of the Commission's auctions have involved shared frequencies; (2) any auction of Part 90 shared spectrum would involve participants ranging in size from very large corporations to very small businesses and individual users, which would require a significant adjustment in the Commission's traditional auction rules; (3) industry participation would be crucial in crafting appropriate auction and service rules; and (4) in light of the public safety services

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[30] AICC Comments at 1-2 and Reply Comments at 2; AAA Comments at 2 and Reply Comments at 2.

provided using Part 90 spectrum, auctioning such spectrum is not in the public interest.[31] AICC and AAA further suggest that those commenters who favor the adoption of general competitive bidding procedures for all spectrum might not have considered the possibility of auctions for shared channels, since the Commission is not currently authorized to award licenses for such spectrum by means of competitive bidding.[32] We agree that shared spectrum is, by definition, not auctionable under Section 309(j) due to the lack of mutual exclusivity.

12. Similarly, Hughes suggests that in the event the Commission decides to auction satellite services, it should conduct a service-specific rule making specially tailored to the capital intensive nature of the satellite industry, instead of employing the general competitive bidding procedures adopted in this proceeding.[33] Although we do not decide that issue now, as we suggested in the Notice, the Commission will continue to adopt service-specific auction procedures where we find that our general competitive bidding procedures are inappropriate.

B. Rules Governing Designated Entities

13. Section 309(j)(4)(D) of the Communications Act of 1934 provides that in prescribing rules for a competitive bidding system, the Commission shall "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based

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[31] *Id.*

[32] AICC Reply Comments at 2; AAA Reply Comments at 2.

[33] Hughes Comments at 1, 6.

services."[34] The statute further directs the Commission to consider the use of tax certificates, bidding preferences, alternative payment schedules and methods of calculations and other procedures as means of accomplishing this statutory objective.[35]

14. We adopt the rules in this *Third Report and Order* in order to facilitate broad-based participation in auctions. We believe that standardizing the rules regarding definitions of eligible entities, unjust enrichment and bidding credits will assist small, minority and women-owned businesses because the rules' predictability will facilitate the business planning and capital fundraising process. While we suspend the use of installment payments, we seek comment in the Second Further Notice of Proposed Rulemaking on whether installment payments should be adopted in the future.

15. We also note that pursuant to Section 309(j)'s obligations to ensure opportunities for participation by small enterprises, rural telephone companies, and minority- and women-owned businesses, and Section 257 of the Telecommunications Act, requiring that the Commission identify and eliminate market entry barriers for small and entrepreneurial telecommunications businesses, we have commenced a series of studies, and have other studies in the planning process, to examine barriers encountered by minorities and women in the auctions process and the secondary market for licenses.[36] When those studies are

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[34] 47 C.F.R.§ 309(j)(4)(D).

[35] *See* 47 C.F.R. ss 309(j)(3)(B) and (j)(4)(D).

[36] Pursuant to the Commission's report on Section 257 of the Telecommunications Act, adopted on May 7, 1997, the Commission found that further study was required to investigate barriers facing minorities and

completed, we will examine whether additional measures are warranted to promote the objectives of giving small businesses, rural telephone companies, and women- and minority-owned businesses the chance to provide spectrum-based services, as required in Section 309(j).

1. Small Business Size Standards

16. *Background*. In the Notice, we proposed to continue our practice, stated in Section 1.2110(b)(1) of our rules, of establishing "the definition of a small business on a service-specific basis, taking into consideration the characteristics and capital requirements of the particular service."[37] We noted that thus far we have used gross revenue ceilings of $3 million, $15 million, $40 million, and $75 million to define small businesses (and $75 million and $125 million to define entrepreneurs),

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women in the telecommunications industry, and delegated responsibility to the Office of Communications Business Opportunities ("OCBO") to conduct studies on this topic. To date, OCBO has commenced studies examining five major areas: (1) barriers to acquisition of cellular, paging and Specialized Mobile Radio licenses on the secondary market, and barriers to entry or growth, comparing small, large, minority and women-owned licensees; (2) barriers to acquisition of broadcast licenses on the secondary market, and barriers to entry or growth, comparing small, large, minority and women-owned licensees; (3) barriers to entry or growth due to advertising industry practices such as paying less to advertise on stations targeting minority communities, and the impact of such practices on ownership opportunities and viewpoint diversity; (4) the impact of duopoly and multiple ownership rules on broadcast station ownership; and (5) the impact of small, minority and women ownership of broadcast stations on service. The Commission is also planning to undertake a study on the experiences of small, minority- and women-owned businesses in the auctions process. *See* Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses (Report), FCC 97-164 (rel. May 8, 1997) ("Section 257 Report").

[37] 47 C.F.R.§ 1.2110(b)(1). *See* Notice at pp 19-20.

which qualify for special provisions such as bidding credits and installment payments plans.[38] We also proposed, for purposes of future auctions, to define small businesses purely in terms of gross revenues. Once the small business definition for any particular service was adopted, we proposed that the special provisions for which such businesses qualify would be determined by schedules set forth in the general competitive bidding rules.[39]

17. We also noted in the Notice that some of our eligibility requirements are defined in terms of gross revenues of "less than" a certain amount, rather than "not exceeding" a certain amount. We tentatively concluded that a uniform method of measurement is preferable because it is more equitable and administratively simpler.[40] Thus, we proposed that when we adopt size standards, those standards should be expressed so as to require businesses to have gross revenues "not to exceed" particular amounts, and that all standards already adopted be

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[38] 47 C.F.R.§ 90.814(b)(1)(i) ($3 and $15 million definition of small business in 800 MHz and 900 MHz SMR); 47 C.F.R.§ 24.720(b)(2) ($15 million definition of small business in broadband PCS F block); 47 C.F.R.§ 24.720(b)(1) ($40 million definition of small business in broadband PCS for C and F blocks); 47 C.F.R.§ 21.961(b)(1) ($40 million definition of small business in MDS) 47 C.F.R.§ 24.711(b)(1) ($75 million definition in broadband PCS C and F blocks); 47 C.F.R.§ 24.709(a)(l) ($125 million gross revenues threshold for determining entrepreneurs' block eligibility in the broadband PCS C and F blocks); and 47 C.F.R.§ 101.1112(d) ($15, $40 and $75 million gross revenues threshold for determining small business and entrepreneurs' block eligibility in LMDS).

[39] Notice at p 20; *see infra* at Section III. B.6.

[40] Notice at p 21.

modified to conform to this method of defining size.[41] We also proposed to base all small business size standards on the applicant's average gross revenues over the preceding three years.

18. *Discussion*. We adopt our proposal to continue to define small businesses, as we have in the past, based on the characteristics and capital requirements of the specific service. We believe that this approach has given us flexibility that will continue to benefit small businesses in future auctions. We also note that this approach is consistent with the Small Business Administration's practice of approving small business size standards on a service-by-service basis.[42] Commenters addressing this issue support this conclusion. For example, AMTA and NextWave both believe that the determination of appropriate small business size standards should be made on a case-by-case basis.[43]

19. No commenters addressed our proposal in the Notice to create size standards that require small businesses to have gross revenues "not to exceed," as opposed to "less than" a certain amount. Nevertheless, we believe that adoption of this proposal is important to further our objective of establishing

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[41] For example, the eligibility rule for the broadband PCS C and F blocks would be modified to read "gross revenues not to exceed $125 million." *See* 47 C.F.R.§ 24.709.

[42] See, e.g., Letter to Daniel B. Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, re: Approval of Small Business Size Standards - Competitive Bidding Rules for 800 MHz Specialized Mobile Radio Services (October 27, 1997).

[43] AMTA Comments at 5; NextWave Reply Comments at 3. *See also* Airadigm Comments at 2-3.

uniform definitions relating to small business standards for future auctions. From this point forward, our service-specific small business definitions will be expressed in terms of average gross revenues over the preceding three years "not to exceed" particular amounts. We also continue to believe that average gross revenues provide an accurate, equitable, and easily ascertainable measure of business size. As we have discussed in the past, a single gross revenues size standard is an established method for determining size eligibility for various kinds of federal programs that aid smaller businesses.[44] NextWave, in its comments, agrees, stating that gross revenues are a generally reliable measure of whether a company is indeed small.[45] In addition, while we have used a total assets test in determining eligibility for entrepreneur blocks,[46] we have not used such a test for determining small business eligibility. We also note that the Small Business Act's statutory definition of small business does not use a total assets test.[47] Thus, we decline to adopt any other measure of business size, such as a total assets test, at this time.[48]

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[44] Fifth Memorandum Opinion and Order, p 23, PP Docket 93-253, FCC 94- 285 (Rel. November 23, 1994) (Fifth Memorandum Opinion and Order).

[45] NextWave Reply Comments at 3.

[46] See, e.g., 47 C.F.R.§ 709(a).

[47] *See* 15 U.S.C.§ 632(c).

[48] Parties in our LMDS proceeding requested that we consider a total asset test for LMDS. Under a "total assets" test, the Commission would exclude entities with total assets exceeding a specific threshold from eligibility for small business provisions. While we declined to adopt such a test for LMDS, we indicated that we would consider it in this proceeding. Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, Petitions

2. Definition of Gross Revenues

20. *Background*. Previously, each of our revenue-based small business size standards for specific services has required applicants to calculate their average gross revenues over a certain number of years. In the Notice, we proposed to adopt a single definition of gross revenues to promote uniformity of regulation.[49] Specifically, we proposed to use our broadband PCS definition of gross revenues, subject to the modification that unaudited financial statements used as a basis for gross revenue calculations must be prepared in accordance with Generally Accepted Accounting Principles ("GAAP"). As we stated previously, this modification would ensure that all gross revenues calculations, audited and unaudited, will be prepared consistently from this point forward. This modification also would discourage bidders from manipulating unaudited financial statements in order to qualify for more advantageous bidding credits or payment terms.

21. In the D, E, and F Block Report and Order we amended our broadband PCS rules, which required that an applicant's determination of average gross revenues be based on the three most recently completed fiscal years, to allow for the use of fiscal or calendar years and simplified our rules to permit D, E, and F block applicants to use unaudited financial statements to support their statements of gross revenues.[50] We

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for Reconsideration of the Commission's Competitive Bidding Rules, Second Order on Reconsideration, Docket 92-297 (rel. September 12, 1997) ("LMDS Second Order on Reconsideration") at p 22.

[49] Notice at p 23.

[50] Amendment of Parts 20 and 24 of the Commission's Rules, Report and Order, WT Docket No. 96-59, 11 FCC Rcd 7824, 7891, p 141 (1996) ("D, E, and F Block Report and Order"); 47 C.F.R.§ 24.720(f).

sought comment on whether we should incorporate this practice into our general auction rules and thereby permit future applicants in all auctionable services to use either fiscal or calendar years and unaudited financial statements to support statements of gross revenues.[51]

22. *Discussion*. All commenters addressing the issue support the Commission's proposal in the Notice to adopt a uniform definition of gross revenues for all auctionable services.[52] We believe that a uniform definition of gross revenues, as the essential element of our small business definitions, furthers our goal of establishing uniform definitions and is administratively efficient. Thus, we adopt a uniform definition of gross revenues in our Part 1 rules.

23. Various commenters addressed specific aspects of our proposed definition of gross revenues. CII supports our proposal that applicants be permitted to use either fiscal year or calendar year figures for calculation purposes.[53] No commenters opposed this proposal. We are persuaded that, just as we concluded in the D, E, and F Block Report and Order, permitting use of either of these figures will assist applicants in providing the most current information available on their applications.[54] We conclude that our general gross revenue definition should permit applicants to support their gross revenue calculations using either fiscal or calendar years.

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[51] Notice at p 24.

[52] *See* CII Comments at 7; ISTA Comments at 1; Airadigm Comments at 3; AMTA Comments at 5; NextWave Reply Comments at 3.

[53] CII Comments at 7.

[54] D, E, and F Block Report and Order, at 134, 141.

24. Several commenters responded to our tentative conclusion in the Notice to accept the use of unaudited financial statements where audited financial statements are unavailable, if prepared in accordance with Generally Accepted Accounting Principles, for gross revenue calculations by auction applicants seeking to qualify for small business status. A majority of these commenters supported our tentative conclusion that where audited financial statements are not available, they should not be required.[55] In particular, these commenters argue that any strict requirement that financial statements be audited is unduly burdensome for most small business applicants.[56] In addition, AMTA contends that the certification requirement already present on the short-form (FCC Form 175) application is sufficient to ensure that small business applicants submit only accurate information, both financial and otherwise, as part of their applications.[57] Only two commenters, ISTA and PageNet advocate that applicants use audited financial statements in order to qualify for small business status.[58] After review of the comments on this issue, we conclude that such a requirement would be onerous to small business. We also agree with AMTA's observation that the certification requirement on our FCC Form 175 acts to ensure that applicants submit accurate information. Furthermore, as discussed below (*see* Section III.C.5, *infra*), we also will retain the authority to audit applicants individually if there is any question concerning small business status. We therefore decline to require all applicants to use audited financial

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[55] *See* AMTA Comments at 5-6; CII Comments at 7, 11-12; Airadigm Reply Comments at 9, 11-12; NPCS Reply Comments at 4.

[56] *Id.*

[57] AMTA Comments at 6.

[58] *See* ISTA Comments at 1; PageNet Comments at 9.

statements to support their gross revenue calculations. Audited financial statements, however, are necessary if they exist. We also note that, consistent with the Small Business Act,[59] where an entity has been in existence for less than three years, the entity's gross revenues should be averaged for the relevant number of years the entity, or its predecessor in interest (affiliate), has been in existence.

25. Accordingly, as proposed in the Notice, and consistent with our broadband PCS rules,[60] we will define gross revenues for all auctionable services as:

> all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (e.g., cost of goods sold), as evidenced by audited financial statements for the three (3) most recent calendar years or, if audited financial statements were not prepared on a calendar-year basis, for the most recently completed fiscal years preceding the filing of the applicant's short-form (FCC Form 175). If an entity was not in existence for all or part of the relevant period, gross revenues shall be evidenced by the audited financial statements of the entity's predecessor- in-interest or, if there is no identifiable predecessor-in-interest, unaudited financial statements certified by the applicant as accurate. When an applicant does not have audited financial statements, its gross revenues must be certified by its chief financial officer or its equivalent and must be prepared in accordance with Generally Accepted Accounting Principles.

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[59] *See* 15 U.S.C. § 632(c)9(ii)(II).

[60] 47 C.F.R.§ 24.720(f).

3. Definition of Affiliate

26. *Background.* We sought comment in the Notice on our definition of "affiliate." In seeking comment on this uniform Part 1 definition, we asked, for example, whether we should amend our definition of affiliate to provide an exception for Indian tribes and Alaska Regional or Village Corporations, as we did for broadband PCS and LMDS.[61] We also recognized that in August of 1996, the Small Business Administration amended and simplified its regulations governing small business size standards, including its definition of the term "affiliate",[62] and asked whether we should consider making similar changes to our rules.

27. *Discussion.* We adopt our proposal to adopt a uniform definition of the term "affiliate" for all future auctions. As we discussed in the Notice, the term "affiliate" is defined by our Part 1 rules as an individual or entity that directly or indirectly controls or has the power to control the applicant; is directly or indirectly controlled by the applicant; is directly or indirectly controlled by a third person(s) that also controls or has the power to control the applicant; or has an "identity of interest" with the applicant.[63] We have found that this definition, which also contains detailed discussion and examples of relevant terms such as "control" and "identity of interest," has proven workable and is broad enough to address a wide variety of business structures. In particular, this definition has helped to

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[61] *See* 47 C.F.R. ss 24.720(l)(11), 101.1112(h)(11).

[62] *See* Small Business Administration, Amendment of Small Business Size Standards, Final Regulations, 61 Fed. Reg. 3177 (January 31, 1996); Corrected Final Regulations, 61 Fed. Reg. 41496 (August 9, 1996) (amending 13 C.F.R. Part 121).

[63] 47 C.F.R. ss 1.2110(b)(4), 24.839(d).

ensure that businesses seeking small business status are truly small. We also believe that this definition, by focusing on "indicia of control," is consistent with our proposal in the Second Further Notice of Proposed Rulemaking (*See* Section IV, *infra*).

28. CIRI requests that we include in our general definition of the term "affiliate" an exemption for Indian tribes and Alaska Regional or Village Corporations, as we did for broadband PCS,[64] and more recently, for LMDS.[65] We agree with CIRI that entities owned and controlled by Indian tribes and Alaska Regional or Village Corporations should be eligible to bid in future auctions as small businesses, notwithstanding their affiliation with other entities owned by tribes or Alaska Native Corporations whose gross revenues cause the combined average gross revenues of the entity and its affiliates to exceed the general limits for eligibility for bidding as such a business. As we stated in support of a similar exemption from our affiliation rules in LMDS, this exception will ensure that these entities will have a meaningful opportunity to participate in spectrum-based services from which they would otherwise be precluded.[66] Furthermore, we do not believe that this exemption for the specified entities will entitle them to an

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[64] *See* 47 C.F.R.§ 24.720(l)(11).

[65] See 47 C.F.R.§ 101.1112(h)(11).

[66] See Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services -- Petitions for Reconsideration of the Denial of Applications for Waiver of the Commission's Common Carrier Point-to-Point Microwave Radio Service Rules; Suite 12 Group Petition for Pioneer Preference, CC Docket No. 92-297, Order on Reconsideration (rel. September 12, 1997) ("LMDS Order on Reconsideration") at p 10.

unfair advantage over entities that are otherwise eligible for small business status.[67]

29. We also take this opportunity to clarify our Part 1 definition of affiliate. Our Part 1 rules provide that parties to a joint venture are considered to be affiliated with each other for purposes of determining the gross revenues of an applicant seeking to qualify for status as a small business.[68] In the past, however, the term "consortium" has been defined on a service-by-service basis as "a conglomerate organization formed as a joint venture between or among mutually independent business firms, each of which individually satisfies the definition of a very small business, small business or entrepreneur."[69] This results in each member of a consortium being defined as an affiliate of each other member. The resulting attribution of gross revenues of each member of the consortium is inconsistent with our intention to permit small or very small businesses to form consortia as a means of increasing the capital available to participate in our auctions, while still being eligible for status as a small business.

30. We therefore amend Section 1.2110(b)(4)(x) to provide that a "consortium" as defined on a service-by-service basis for purposes of determining status as a designated entity will not be treated as a "joint venture" under our attribution standards. As a result, when two or more entities form an association that meets the service-specific definition of a "consortium," the gross revenues of each entity will not be

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[67] *Id.*

[68] See 47 C.F.R.§ 1.2110(b)(4)(x).

[69] See, e.g., 47 C.F.R.§ 101.1112(f) (defining the term "consortium" for LMDS).

attributed to each entity in determining eligibility for designated entity status. We believe that this clarification to the general definition of the term " affiliate" will enhance the ability of small businesses to form associations that will permit them to bid for licenses that would be too expensive for them individually. Auction winners have successfully used consortium structures to acquire licenses and "spin-off" licenses post-auction, and we wish to continue to make this option available.[70]

4. Definition of Rural Telephone Company

31. *Background.* Our current Part 1 rules define "rural telephone company" (or "rural telco") as any local exchange carrier, including affiliates, with 100,000 access lines or fewer.[71] We noted at the time this definition was adopted that it comported with the definition that had been adopted for broadband PCS.[72] In the Notice, however, we noted that we have revised the definition of rural telephone company contained in our broadband PCS rules to conform with that contained in the Communications Act, as amended by the Telecommunications Act of 1996 ("1996 Act").[73] We tentatively concluded that the definition of rural telco set forth in the 1996 Act should apply to all auctionable services.

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[70] *See*"Rural Success Stories" in FCC Report to Congress on Spectrum Auctions, WT Docket No. 97-150, Report, FCC 97-353 (rel. October 9, 1997) ("Report to Congress") at 26.

[71] 47 C.F.R.§ 1.2110(b)(3).

[72] *Competitive Bidding Second Memorandum Opinion and Order*, 9 FCC Rcd at 7245, 7257.

[73] Pub. L. No. 104-104,§ 3 110 Stat. 56 (1996) ("1996 Act"); codified at 47 U.S.C.§ 153 (37). *See also* 47 C.F.R.§ 24.720(e) and D, E, and F Block Report and Order, 11 FCC Rcd at 7855, p 62.

32. *Discussion.* The National Telephone Cooperative Association ("NTCA") and the Rural Telecommunications Group ("RTG"), commented in support of our proposal in the Notice to adopt the definition of a rural telephone company contained in the Telecommunications Act of 1996 as the single definition of the term to be used in all auctionable services.[74] No commenters opposed our proposal. As we noted in the Notice, when we amended the broadband PCS rule, we stated that using the definition contained in the 1996 Act would likely expedite the delivery of advanced services to rural areas.[75] We also noted that adopting the 1996 Act definition would promote uniformity of regulations and is therefore consistent with the mandate of that legislation to ease regulatory burdens and eliminate unnecessary regulation.[76] We believe that the same reasons for amending this definition in the broadband PCS rules justify amending the definition in Part 1 for all services subject to competitive bidding.

33. Thus, we amend Section 1.2110(b)(3) to define the term "rural telephone company" as a local exchange carrier operating entity to the extent that such entity -- (A) provides common carrier service to any local exchange carrier study area that does not include either (i) any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census, or (ii) any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993; (B) provides telephone

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[74] See NTCA Comments at 2; RTG Reply Comments at 1-3.

[75] See D, E, and F Block Report and Order, 11 FCC Rcd at 7855, p 66.

[76] *Id.*

exchange service, including exchange access, to fewer than 50,000 access lines; (C) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or (D) had less than 15 percent of its access lines in communities of more than 50,000 on the date of enactment of the Telecommunications Act of 1996.

5. Installment Payments

34. *Background.* Section 309(j) of the Communications Act encourages participation by small businesses and other "designated entities" in the Commission's competitive bidding process.[77] Among other methods, allowing winning bidders to pay for their licenses using installment plans has been one method we have used to encourage small business involvement in the wireless marketplace. In the *Competitive Bidding Second Report and Order*, we adopted a framework for establishing installment payment plans that we believed would be an effective way to promote the participation of small businesses in the provision of spectrum-based telecommunications services and an effective tool for efficiently distributing licenses and services among geographic areas.[78] Our general competitive bidding rules currently allow small businesses to pay a substantial amount of their high bids in installments over the term of their licenses.[79] We observed in the Notice that small businesses have been successful bidders in the auctions in which installment payment plans were offered.[80] In the

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[77] 47 U.S.C. ss 309(j)(4)(A), (D).

[78] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2391, p 240.

[79] 47 C.F.R.§ 1.2110(e).

[80] See Notice at p 34. *See also* Report to Congress at 27.

Notice, we sought comment on a variety of proposals regarding our installment payment program intended to improve the ability of small businesses to participate successfully in future auctions. We also sought comment on whether we should offer higher bidding credits in lieu of installment payments.

35. In considering several petitions for reconsideration of the LMDS *Second Report and Order*, we recently eliminated installment payment provisions in LMDS and indicated that we would reexamine our installment payment rules in considering the general proposals regarding installment payments in this proceeding.[81] Similarly, we eliminated installment payment provisions in the upper 200 channels of the 800 MHz SMR service,[82] and deferred until this proceeding our decision on whether to make an installment payment plan available for the auction of the lower 80 and General Category channels in the 800 MHz SMR service.[83]

36. Earlier this year, the Commission received several requests, from both C and F block licensees, for relief

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[81] See LMDS Second Order on Reconsideration. *See also*, Petitions for Reconsideration of the LMDS *Second Report and Order* filed by CellularVision USA, Inc. ("CellularVision"), WebCel Communications, Inc. ("WebCel"), Cook Inlet Region, Inc. ("Cook Inlet"), LBC Communications, Inc. ("LBC"), the Rural Telecommunications Group ("RTG"), the Independent Alliance, and Sierra Digital Communications, Inc.

[82] See 800 MHz Memorandum Opinion and Order and Order on Reconsideration at p 130.

[83] See Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93- 144, *Second Report and Order*, FCC 97-223 (rel. July 10, 1997) at p 279.

associated with the installment payment program.[84] On March 31, 1997, in response to a joint request from several C block licensees seeking to modify their installment payment obligations, and because of other debt collection issues, the Bureau suspended the deadline for payment of installment payments for all C block licensees.[85] On April 28, 1997, the Bureau extended the suspension to F block licensees.[86]

37. On June 2, 1997, the Bureau, explaining that it had received several proposals from C block licensees regarding alternative financing arrangements and a petition for rule making regarding the issue of broadband PCS C block installment payments, issued the Installment Public Notice seeking comment on these proposals and invited any "additional proposals for addressing the C and F block broadband PCS financing terms."[87] The Bureau also sought comment on whether C block licensees should be permitted to

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[84] See Installment Payment Public Notice. *See also* Letter from Thomas Gutierrez, Esq., et al to Michele C. Farquhar, Esq., Chief, Wireless Telecommunications Bureau (March 13, 1997).

[85] See Installment Payments for PCS Licenses, Order, DA 97-649 (rel. March 31, 1997).

[86] *See* "FCC Announces Grant of Broadband Personal Communications Services D, E, and F Block Licenses," Public Notice, DA 97-883 (rel. April 28, 1997) at 2.

[87] *Installment Payment Public Notice*. Several parties also filed petitions for reconsideration in the Commission's paging proceeding, in which they requested that the Commission reconsider its adoption of installment payment plans for small businesses. See Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, Petitions for Reconsideration, filed by Paging Network, Inc. and Personal Communications Industry Association, April 11, 1997.

prepay their installment debt.[88] After consideration of the extensive record in this proceeding, the Commission adopted a menu of options to assist C block licensees experiencing financial difficulties under their installment payment obligations.[89] Citing the difficulties encountered in the past, the Commission proposed not to adopt an installment payment plan for the reauction of licenses surrendered pursuant to these options.[90]

38. *Discussion.* After careful review of the comments in response to our general Part 1 rule making, the comments in response to the Installment Payment Public Notice, and our recent decisions in the broadband PCS C block, LMDS and 800 MHz SMR services, we have determined that installment payments should not be used in the immediate future as a means of financing small business participation in our auction

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[88] The Bureau also conducted an "FCC Public Forum" on June 30, 1997, to discuss broadband PCS C and F block installment payment issues. In addition, the Commission established an FCC Task Force which included representatives from the Bureau, the Office of Plans and Policy, the Office of General Counsel, and the Office of Communications Business Opportunities. This Task Force was charged with evaluating the C block installment payment program, considering proposals for alternative financing arrangements submitted by licensees, and recommending to the Commission how to respond to those proposals.

[89] See Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Second Report and Order* and Further Notice of Proposed Rule Making, WT Docket No. 97-82, 62 Fed Reg 55348 (rel. October 16, 1997) ("*Second Report and Order* and Further Notice of Proposed Rule Making").

[90] *Second Report and Order* and Further Notice of Proposed Rule Making at p 101.

program.[91] As we indicated in the *Second Report and Order* in this Docket, the Commission must balance competing objectives in Section 309(j) that require, inter alia, that it promote the development and rapid deployment of new spectrum-based services and ensure that designated entities are given the opportunity to participate in the provision of such services.[92] We note that our experience has demonstrated that installment payments may not be necessary to ensure a meaningful opportunity for small businesses to participate successfully in our auction program. For example, in the cellular auction of licenses for unserved areas, which had no special bidding provisions, 36 percent of the licenses went to small or very small businesses. We also stated that in assessing the public interest, we must try to ensure that all the objectives of Section 309(j) are considered. The Commission has found, for example, that obligating licensees to pay for their licenses as a condition of receipt requires greater financial accountability from applicants.[93]

39. In addition, questions have been raised in bankruptcy litigation about whether the Commission can quickly reclaim licenses should a licensee declare bankruptcy (even though licenses are expressly conditioned upon payment and cancel

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[91] *See* "FCC Announces Spectrum Auction Schedule for 1998," Public Notice, DA 97-2497 (rel. November 25, 1997), announcing the following upcoming auctions: LMDS, 220 MHz, broadband C block Reauction, 39 GHz, Paging, 800 MHz SMR (Lower 80 and General Category Channels), Location Monitoring Services (LMS), Public Coast Stations, Pending Analog Broadcast Licenses for Commercial Radio and Television Stations. *See also* "FCC Announces Auction Schedule for the General Wireless Communications Service," Public Notice, DA 97-2634 (rel. December 17, 1997).

[92] See 47 U.S.C. ss 309(j)(3) and (4).

[93] See 800 MHz Memorandum Opinion and Order at p 130.

automatically in the event of nonpayment) resulting in significant delays in the provision of service to the public.[94] While we are confident of prevailing in any litigation, until controlling precedent is established or legislation addressing the conflicting rights is enacted, such delays may occur. In this regard, the Commission has strongly urged Congress to adopt legislation that would clarify that provisions of the Bankruptcy Code (1) are not applicable to any FCC license for which a payment obligation is owed; (2) do not relieve any licensee from payment obligations; and (3) do not affect the Commission's authority to revoke, cancel, transfer or assign such licenses.[95] We also note that, in order to balance the impact on small businesses of our decision to discontinue the use of installment payments in the near future, we are adopting higher bidding credits than those proposed in the Notice (see Section III.B.6, *infra*).

40. Therefore, subject to our proposals in the Second Further Notice of Proposed Rule Making, Section IV, *infra*, we conclude that until further notice, installment payments should not be offered in auctions as a means of financing small business and other designated entities seeking to secure spectrum licenses. Consistent with this decision, we hereby eliminate installment payments in the auction of the lower 80 and General Category channels in the 800 MHz SMR service.[96]

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[94] Report to Congress at 39.

[95] See Report to Congress at 39. *See also* Letters from the FCC Commissioners (1) to the Honorable Orrin G. Hatch and the Honorable Patrick J. Leahy; and (2) to the Honorable Henry J. Hyde and the Honorable John Conors, both dated September 18, 1997; Letter from FCC Chairman Reed E. Hundt to the Honorable Pete Domenici and the Honorable John R. Kasich, dated July 25, 1997.

[96] See 800 MHz *Second Report and Order* at p 279.

Although Merlin submits that the elimination of the Commission's installment payment provisions in any service would be contrary to the Commission's conclusions in previous rule makings,[97] we believe that this decision is consistent with suggestions of CIRI, as well as our general experience in examining the success of the installment payment program to date.[98] As we recently recognized in eliminating installment payments for LMDS licensees, Congress did not require the use of installment payments in all auctions, but rather recognized them as one means of promoting the objectives of Section 309(j)(3) of the Communications Act.[99] The Commission

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[97] Merlin Comments at 4.

[98] CIRI asserts that installment payment plans fueled speculation in the broadband PCS auctions, encouraged expectations of Commission relief from payment obligations, and saddled the Commission with difficult credit-related tasks for which it has no experience. CIRI further argues that installment payment programs force the Commission to balance its duty to regulate the provision of wireless services with its sometimes conflicting obligation to manage the federal debt responsibly. See CIRI Comments at 11; Petition for Rule Making Regarding the Administration and Disposition of Competitive Bidding Installment Payment Obligations filed by Cook Inlet Region, Inc. (May 7, 1997) ("CIRI Petition for Rule Making").

[99] Specifically, Section 309(j)(4) of the Communications Act states that the Commission shall, in prescribing regulations pursuant to these objectives and others, "consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods that promote the objectives described in paragraph (3)(B) ...." See 47 U.S.C.§ 309(j)(4)(A) (emphasis added). *See also* Omnibus Budget Reconciliation Act of 1993, Report of the Committee on the Budget, House of Representatives, to Accompany H.R. 2264, A Bill to Provide for Reconciliation Pursuant to Section 7 of the Concurrent Resolution of the Budget for Fiscal Year 1994, May 25, 1993, at p. 255:

While it is clear that, in many instances, the objectives of section 309(j) will be best served by a traditional, "cash-on-the-barrelhead" auction, it is important that the Commission employ different methodologies as

continues to experiment with different means of achieving its obligations under the statute, and has offered installment payments to licensees in several auctioned wireless services.[100] Installment payments are not the only tool available to assist small businesses. Indeed, we have conducted auctions without installment payments.[101] Moreover, Section 3007 of the

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appropriate. Under this subsection, the Commission has the flexibility to utilize any combination of techniques that would serve the public interest.

[100] See, e.g., Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Fourth Report and Order, 9 FCC Rcd 2330 (1994) (Interactive Video Data Services); Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Third Report and Order*, 9 FCC Rcd 2941 (1994) ("Narrowband PCS *Third Report and Order*") (regional narrowband PCS); Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Fifth Report and Order, 9 FCC Rcd 5532 (1994) (broadband PCS); Implementation of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589 (1995) (Multipoint Distribution Service); and Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, PR Docket No. 89-553, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Implementation of Sections 3(n) and 322 of the Communications Act, GN Docket No. 93-252, Second Order on Reconsideration and Seventh Report and Order, 11 FCC Rcd 2639 (1995) (900 MHz Specialized Mobile Radio ("SMR")).

[101] Such as the auctions of licenses for the Wireless Communications Service ("WCS"), nationwide narrowband PCS, and cellular unserved areas. See, respectively, Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS"), GN Docket No. 96-228, Report and Order, FCC 97-50, 62 Fed. Reg. 9636 (rel. February 19, 1997) ("WCS Report and Order"); Narrowband PCS *Third Report and Order*; and Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Amendment of Part 22 of the

Balanced Budget Act requires that the Commission conduct certain future auctions in a manner that ensures that all proceeds from such bidding are deposited in the U.S. Treasury not later than September 30, 2002. Although we seek comment on offering installment payment plans in the future (see Section IV), we believe that Section 3007 may require that these auctions be conducted without offering long-term installment payments.[102]

41. In this regard, we agree with commenters such as CIRI, that contend that increased bidding credits will allow responsible small bidders with appropriately tailored business plans to secure adequate private financing to be successful in future auctions.[103] Further, as we have already noted, Section 309(j) requires the Commission to consider alternative methods to allow for dissemination of licenses among designated entities, including small businesses. We believe that the rules we adopt below (see Section III.B.6, *infra*) regarding the use of bidding credits for small business applicants in future auctions will both fulfill the mandate of Section 309(j) to provide small

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Commission's Rules to Provide for the Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules, CC Docket No. 90-6, Ninth Report and Order, 11 FCC Rcd 14769 (1996).

[102] See Section 3001 of the Omnibus Consolidated Appropriations Act for 1997, P.L. 104-208, 110 Stat. 3009 (1996) ("Omnibus Consolidated Appropriations Act"). *See also* the Balanced Budget Act of 1997. The Conference Report on the Balanced Budget Act of 1997 indicates that the deadline set forth in Section 3007 "applies to all competitive bidding provisions in this title of the conference agreement and any amendments to other law made in this title." Conference Report on H.R. 2015, Balanced Budget Act of 1997, Congressional Record -- House, Vol. 143, No. 109 -- Part II, at H6176.

[103] CIRI Petition for Rule Making.

businesses with the opportunity to participate in auctions and ensure that new services are offered to the public without delay.

42. Merlin contends that while significant bidding credits can be useful in helping smaller entities win licenses when they bid against larger companies, bidding credits alone do not help smaller entities access the capital required to build a spectrum-based service.[104] In addition, Merlin states that eliminating the installment payment plan would raise the cost of capital for small businesses which would be forced to borrow additional funds from commercial lenders at higher interest rates.[105] Merlin also argues that because many small businesses have relied on the current installment plan terms in formulating business plans necessary to bid in upcoming auctions, any decision to eliminate the installment payment program could effectively preclude small business participation in future auctions altogether.[106] We disagree with Merlin's assertions. As we have discussed, we believe that the increased bidding credits we adopt below will help fulfill the mandate of Section 309(j)(4)(D) of the Communications Act to provide small businesses with the opportunity to participate in spectrum-based services.[107] As noted above, this approach was successful in enabling small businesses to participate in the WCS auction, in which we were unable to employ installment

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[104] Merlin Comments at 5.

[105] Merlin Comments at 7.

[106] Merlin Comments at 5-6.

[107] 47 U.S.C.§ 309(j)(4)(D). Additionally, providing a sufficient period of time for potential small business bidders to formulate their business plans is important. Congress acknowledged this in the Balanced Budget Act, and this is an issue to which we are sensitive. *See* "LMDS Auction Postponed Until February 18, 1998," Public Notice, DA 97-2352 (rel. November 10, 1997).

payments because of the statutory deadline for depositing auction revenues in the U.S. Treasury.[108] We also recently used this approach in establishing rules for the auction of licenses for 800 MHz SMR and LMDS.[109]

43. We recognize that the Commission previously adopted rules for both the 220 MHz and paging services that permit eligible small businesses to pay for their licenses in installments.[110] Several petitions for reconsideration have been filed in these proceedings that remain pending before the Commission.[111] The Commission will resolve these petitions separately in a manner consistent with our decision herein to suspend the use of installment payment plans at least until our rights to recover and reauction licenses in a timely fashion are established.

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[108] See Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS"), GN Docket No. 96-228, Notice of Proposed Rulemaking, FCC 96-441, 61 Fed. Reg. 59048 (rel. November 12, 1996), at p 63; and WCS Report and Order at p 182. *See also* Section 3001 of the Omnibus Consolidated Appropriations Act.

[109] See 800 MHz MO&O. In the 800 MHz auction, 10 of the 14 bidders winning licenses qualified as either small or very small businesses. These bidders won 38 of 525 licenses offered.

[110] See 220 MHz *Third Report and Order*, 12 FCC Rcd at 10943, p 301; Paging *Second Report and Order* and Further Notice of Proposed Rule Making, 12 FCC Rcd at 2813-14, p 184.

[111] See, e.g., Arch Communications, Inc., Petition for Partial Reconsideration and Request for Clarification (filed April 11, 1997); Paging Network, Inc., Petition for Reconsideration and Clarification (filed April 11, 1997); Personal Communications Industry Association, Petition for Reconsideration (filed April 11, 1997).

6. Bidding Credits

44. *Background.* The current general competitive bidding rules provide for bidding credits (i.e., payment discounts) for eligible designated entities and state that service-specific rules will specify the designated entities eligible for bidding credits, the licenses for which bidding credits are available, the amounts of bidding credits, and other procedures.[112] Thus, the Commission has adopted separate rules governing bidding credits for various auctionable services.[113] We proposed in the Notice that our general competitive bidding rules be amended so that the levels of available bidding credits are defined and uniform for all auctionable services. We proposed a schedule of bidding credits that we believed would provide adequate opportunities for small businesses of varying sizes to participate in spectrum auctions. We also asked how limiting the use of installment payments should affect the levels of bidding credits that are offered.

45. *Discussion.* Although all commenters addressing the issue are largely supportive of the use of bidding credits as a means of ensuring the widest possible participation in future auctions,[114] there is disagreement among commenters as to whether a standard schedule of bidding credits for small businesses is desirable. For example, CII supports our proposal to standardize the sliding scale of bidding credits that is

[112] 47 C.F.R.§ 1.2110(f).

[113] See, e.g. 47 C.F.R.§ 24.712.

[114] See Airadigm Comments at 6; CIRI Comments at 11-12; CII Comments at 13; PCIA Comments at 3; AMTA Comments at 10-11; Merlin Comments at 15-16 and Reply Comments at 3; Compu-DAWN Comments at 9; NTCA Comments at 2-3; RTG Reply Comments at 1, 6; NPCS Reply Comments at 5.

available to an applicant. Specifically, CII believes that granting businesses of different sizes different levels of bidding credits in different services threatens to result in inconsistent participation by small businesses in spectrum auctions.[115] In contrast, some commenters oppose any set schedule of bidding credits, and believe that the Commission should specify appropriate bidding credits for each auctionable service.[116] Among these, PCIA and AMTA believe that the Commission should continue to examine what constitutes an effective bidding credit on a service-by-service basis because the financing requirements of different spectrum-based services may necessitate use of different size bidding credits to provide the proper assurances that small businesses will be able to effectively compete.[117] As we stated in the Notice, we believe that an approach in which we provide certainty for future auctions about the size of available bidding credits will benefit small businesses because potential bidders will have more information well in advance of the auction than previously about how such levels will be set.[118] Once a small business definition is adopted for a particular service, eligible businesses will benefit they are able to refer to a schedule in our Part 1 rules to determine the level of bidding credit available to them. We therefore adopt our proposal to create a standard schedule of bidding credits.

46. In light of our decision (see Section III.B.5, *supra*) to suspend installment payment financing for the near future, we

[115] CII Comments at 13.

[116] See PCIA Comments at 3; AMTA Comments at 10-11; Compu-DAWN Comments at 9.

[117] PCIA Comments at 3; AMTA Comments at 10-11.

[118] See *supra* at p 36-38.

have determined that higher bidding credits than those proposed in the Notice would better effectuate our statutory mandate. Airadigm supports larger bidding credits than those proposed by the Commission.[119] Similarly, CIRI contends that unless the Commission is prepared to establish the creditworthiness of installment payment applicants, the Commission should offer substantial bidding credits to small businesses in lieu of government financing.[120] We note that some commenters argue that, in relation to installment payment provisions, bidding credits are less effective in allowing designated entities to participate in the Commission's auction program.[121] For example, Pocket states that bidders often "bid through" bidding credits and that bidding credits tend to result in higher bids and, in general, higher auction prices.[122] We believe that without installment payments, bidding credits, coupled with providing bidders sufficient time to raise financing, will enable small businesses to successfully compete in future auctions. Also, tiered bidding credits have proven to work well and provide for more competition between small business participants of different sizes. The use of tiered bidding credits was successful in enabling small businesses to participate in the WCS auction, in which we were unable to employ installment payments because of the statutory deadline for depositing auction revenues in the U.S. Treasury.[123] Finally, while we recognize Pocket's concerns about the possibility that bidders "bid through" bidding credits, we do not believe that this problem is significant where not all bidders are eligible for

[119] Airadigm Comments at 6, Reply Comments at 9.

[120] CIRI Comments at 11 and Reply Comments at 2-3.

[121] See, e.g., Merlin Reply Comments at 3.

[122] Pocket Comments at 4-5.

[123] See WCS Report and Order, 12 FCC Rcd at 10785, p. 182.

bidding credits, and the size of the bidding credit varies among those who are eligible.

47. Consistent with this reasoning, we adopt the following schedule of bidding credits for use in future auctions in which provisions for designated entities are offered:

Average Annual Gross Revenues	Bidding Credits
Not to exceed $3 million	35%
Not to exceed $15 million	25%
Not to exceed $40 million	15%

We recognize that these credits are higher than some previously adopted for specific services.[124] Based on our past auction experience and the suspension of installment payments, however, we believe that the approach taken here will provide adequate opportunities for small businesses of varying sizes to participate in spectrum auctions.

48. We recognize that Merlin recommends providing higher bidding credits than those which we adopt.[125] Specifically, Merlin suggests that (1) businesses with average gross revenues for the preceding three years not exceeding $3 million be eligible for bidding credits of 40 percent; (2)

[124] For instance, a business with average gross revenues of not more than $3 million in the 900 MHz SMR auction received a 15% bidding credit rather than the 35% bidding credit we adopt. See 47 C.F.R.§ 90.814(b)(2). In contrast, our decision is consistent with our rules for the broadband PCS F block, in which a business with average gross revenues of not more than $15 million received a 25% bidding credit. See 47 C.F.R.§ 24.717(b).

[125] Merlin Comments at 15-16.

businesses with average gross revenues for the preceding three years not exceeding $15 million be eligible for bidding credits of 35 percent; and (3) businesses with average gross revenues for the preceding three years not exceeding $40 million be eligible for bidding credits of 25 percent.[126] As discussed above, we believe that higher bidding credits than those proposed in the Notice are necessary now that our installment payment program is suspended. We believe that the schedule of bidding credits we adopt is reasonable in light of our decision to suspend installment payments for services auctioned in the immediate future, and expect that it will prove sufficient to enable small businesses to obtain spectrum licenses through our auction program. Thus, we decline to adopt Merlin's proposal. We also note that we seek comment in this Second Further Notice of Proposed Rule Making on means other than bidding credits and installment payments by which the Commission might facilitate the participation of small businesses in our spectrum auction program.

7. Unjust Enrichment

49. *Background*. In the Notice, we observed that unjust enrichment provisions in our general competitive bidding rules and service-specific rules vary. Under our general competitive bidding rules, a licensee seeking Commission approval of a transfer of control or an assignment of a license acquired through the competitive bidding process utilizing installment payments is required to pay the remaining principal balance as a condition of the transfer. No payment is required, however, when the proposed transferee or assignee is qualified to obtain the same installment financing and assumes the applicant's

[126] Merlin Comments at 17-18.

installment payment obligations.[127] In the broadband PCS unjust enrichment rule, however, we specify that applicants seeking to assign or transfer control of a license to an entity not meeting the eligibility standards for installment payments must pay not only unpaid principal as a condition of Commission approval but also any unpaid interest accrued through the date of assignment or transfer.[128] This rule also provides that if a licensee utilizing installment financing seeks to make any change in its ownership structure that would result in the loss of eligibility for installment payments, it must pay the unpaid principal and accrued interest as a condition of Commission approval of the change.[129] Finally, in recognition of the tiered installment payment plans offered to broadband PCS licensees, the rule provides that if a licensee seeks to make any change in ownership that would result in the licensee qualifying for a less favorable installment plan, it must seek Commission approval and adjust its payment plan to reflect its new eligibility status.[130] A licensee, under this rule, may not switch its payment plan to a more favorable plan.

50. Under our general competitive bidding rules, a licensee seeking Commission approval of a transfer of control or an assignment of a license acquired through the competitive bidding process utilizing bidding credits, or proposing to take any other action relating to ownership or control that will result in loss of eligibility for such bidding credits, is required to pay the sum of the amount of the bidding credit plus interest as a

[127] 47 C.F.R. § 1,2111(c).

[128] 47 C.F.R. § 24.716(d)(1).

[129] 47 C.F.R. § 24.716(d)(2).

[130] 47 C.F.R. § 24.716(d)(3).

condition of FCC approval.[131] Under our broadband PCS rules, if, within the original term, a licensee applies to assign or transfer control of a license to an entity that is eligible for a lower bidding credit, the difference between the bidding credit obtained by the assigning party and the bidding credit for which the acquiring party would qualify must be paid as a condition of approval of the assignment or transfer.[132] We proposed to amend our general unjust enrichment rules to conform them to our broadband PCS rules.

51. We also requested comment in the Notice on whether we should adopt a uniform unjust enrichment provision, and if so, whether it should be modeled on those we have recently adopted for some other services that provides a scale of decreasing payment liability for licensees that received a bidding credit based on the number of years a license is held.[133] We also requested comment on unjust enrichment rules as they apply to partitioning and disaggregation.[134] We asked whether, assuming we decide to adopt partitioning and disaggregation for various services, how the unjust enrichment rules should apply when the partitioner or disaggregator is the recipient of a bidding credit or is paying on an installment payment plan. We also asked whether we should adopt for all auctionable services the same provisions that we adopted for broadband

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[131] 47 C.F.R. § 1.2111(d).

[132] 47 C.F.R. §§ 24.712(b)(2), 24.717(c)(2).

[133] See, e.g., 47 C.F.R. § 90.81(b)(1) (SMR).

[134] See Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees, Report and Order and Further Notice of Proposed Rule Making, 11 FCC Rcd 21831 at 21851, pp 31-36, 55 (1996) ("Partitioning and Disaggregation Report and Order").

PCS.[135]

52. *Discussion.* We adopt our proposal to conform our Part 1 unjust enrichment rules to the broadband PCS rules. We believe that effective unjust enrichment rules are necessary to ensure that meaningful small business participation in spectrum-based services is not thwarted by transfers of licenses to non-designated entities. As we stated in the Notice, the broadband PCS unjust enrichment rules are preferable to our current general unjust enrichment rules because they provide greater specificity about funds due at the time of transfer or assignment and specifically address changes in ownership that would result in loss of eligibility for installment payments, which the current general rules do not address. The broadband PCS rules also address assignments and transfers between entities qualifying for different tiers of installment payments or bidding credits, thus supplying clearer guidance for auctions in which tiered installment payment plans or bidding credits are provided. Commenters addressing this issue largely support this decision. For example, Pocket and Ericsson both argue that modified unjust enrichment rules would still deter transfers designed to subvert the Commission's rules, but would provide businesses with more flexibility in situations of financial distress and permit the transfer of individual licenses that no longer comport with their business plans.[136]

53. Current as well as future licensees will be governed by the rules we adopt providing for unjust enrichment payments upon assignment, transfer, partitioning and disaggregation. While we did not receive significant comment on this issue, we note that in awarding licenses in the past, the Commission has

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[135] *Id.*

[136] Pocket Comments at 6; Ericsson Reply Comments at 4.

emphasized that the terms associated with the continued grant of a license will be governed by current Commission rules and regulations. For example, in awarding licenses to C block licensees paying for their licenses in installments, the Commission indicated in the associated " Note" and "Security Agreement" that the terms of the installment plan would be governed by and construed in accordance with then-applicable Commission orders and regulations, as amended. Therefore, we conclude that the unjust enrichment rules we adopt apply to existing licensees, and supersede service-specific rules where applicable. Specifically, these rules will supersede existing unjust enrichment provisions in the narrowband and broadband PCS, WCS, 900 MHz, and IVDS services.[137] As discussed above (see Section III.B.5, *supra*), we suspend the use of installment payments for the immediate future as a means of financing small business participation in our auction program. As a result, our decision with regard to unjust enrichment payments as they relate to licensees paying for their licenses in installment payments will apply only to existing licensees, their transferees and assignees (until we reinstate installment payments).

a. Installment Payments

54. For existing licensees who make use of Commission installment payment financing, we amend Section 1.2111(c) to conform to our broadband PCS rules. Specifically, if a licensee seeks to assign or transfer control of its license to an entity not meeting the eligibility standards for installment payments, the licensee must make full payment of the remaining unpaid

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[137] See 47 C.F.R. ss 24.309(f) (narrowband PCS), 24.711 (C block), 24.716(d) (F block), 27.209(d)(1), (2) (WCS), 90.812(b) (900 MHz), 95.816(e) (IVDS).

principal and any unpaid interest accrued through the date of the assignment or transfer as a condition of Commission approval. Similarly, if the licensee seeks to make any change in ownership structure that would result in the licensee losing eligibility for installment payments, the licensee must first seek Commission approval and must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of such change as a condition of approval.[138] If a licensee seeks to make any change in ownership that would result in the licensee qualifying for a less favorable installment plan, the licensee must seek Commission approval and must adjust its payment plan to reflect its new eligibility status.[139]

b. Bidding Credits

55. For existing and future licensees who qualified or qualify in the future for a bidding credit in paying for their winning bid, we also amend Section 1.2111(c) to provide for unjust enrichment payments similar to those contained in our broadband PCS rules. Specifically, during the term of the initial license grant, if a licensee seeks to assign or transfer control of its license to an entity not meeting the eligibility standards for bidding credits, or seeks to make any other change in ownership that would result in the licensee no longer qualifying for a bidding credit, the licensee must seek

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[138] We note that, consistent with out broadband PCS rules, a licensee's (or other attributable entity's) increased gross revenues or increased total assets due to nonattributable equity investments (i.e., from sources whose gross revenues and total assets are not considered under § 24.709(b)), debt financing, revenue from operations or other investments, business development or expanded service shall not be considered to result in the licensee losing eligibility for installment payments.

[139] A licensee may not switch its payment plan to a more favorable plan.

Commission approval and must reimburse the government for the amount of the bidding credit, plus interest based on the rate for U.S. Treasury obligations applicable on the date the license is granted, as a condition of the approval of such assignment, transfer or other ownership change.[140] Similarly, if the licensee seeks to assign or transfer control of its license to an entity meeting the eligibility standards for lower bidding credits, or seeks to make any other change in ownership that would result in the licensee qualifying for a lower bidding credit under this section, the licensee must seek Commission approval and must pay to the United States Treasury the difference between the amount of the bidding credit obtained by the licensee and the bidding credit for which the assignee, transferee or licensee is eligible as a condition of the approval of such assignment, transfer or other ownership change. These provisions also will apply to licensees who partition or disaggregate their licenses.

56. We also adopt our proposal in the Notice to provide for decreasing unjust enrichment payments for licensees that utilized a bidding credit when paying for their licenses and that make transfers and assignments occurring later in the license term. This decision also is supported by the commenters.[141] In amending the rule in this manner, we ensure that our general rule resembles those rules the Commission has adopted in specific services (e.g., MDS, narrowband PCS, and 900 MHz SMR) that reduce the amount of unjust enrichment payments due on transfer based upon the amount of time the initial license has been held.[142] Consistent with the rules that exist in

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[140] But see *Second Report and Order* and Further Notice of Proposed Rule Making.

[141] See ISTA Comments at 2; CII Comments at 13-14.

[142] Ericsson Reply Comments at 4-5.

these services,[143] the amount of this payment will be reduced over time as follows: A transfer in the first two years of the license term will result in a forfeiture of 100 percent of the value of the bidding credit (or, in the case of very small businesses transferring to small businesses, 100 percent of the difference between the bidding credit received by the former and the bidding credit for which the latter is eligible); in year three of the license term the payment will be 75 percent; in year four the payment will be 50 percent; and in year five the payment will be 25 percent, after which there will be no payment. These assessments will have to be paid to the U.S. Treasury as a condition of approval of the assignment, transfer, or ownership change. All current and future licensees, with the exception of entrepreneur block licensees subject to restrictions on assignments and transfers of licenses,[144] will be governed by this modification to our general rules. We believe that our decision to maintain the original transfer restrictions for such licensees is proper in light of the special provisions which were made available for licensees in our entrepreneur blocks.[145]

c. Unjust Enrichment and Partitioning and Disaggregation

57. Also as proposed in the Notice, we will adopt a general rule modeled on our broadband PCS rules to determine the amount of unjust enrichment payments assessed for all current and future licensees.[146] Thus, we adopt a general unjust

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[143] See, e.g., 47 C.F.R.§ 90.810(b)(i) (SMR).

[144] See 47 C.F.R.§ 24.839(d).

[145] See, e.g., 47 C.F.R.§ 90.810(b)(1) (SMR). But see Broadcast NPRM at p 95 (seeking comment on somewhat different unjust enrichment provisions).

[146] Notice at p 43; Partitioning and Disaggregation Report and Order.

enrichment rule that treats partitioning and disaggregation by licensees in the same manner as the broadband PCS rule. Specifically, if the licensee seeks to partition any portion of its geographic service area, the amount of the unjust enrichment payment discussed above will be calculated based upon the ratio of population in the partitioned area to the overall population of the licensed area.[147] Similarly, if a licensee seeks to disaggregate spectrum, the amount of the unjust enrichment payment will be determined based upon the ratio of the amount of spectrum disaggregated to the amount of spectrum held by the disaggregating licensee.[148]

C. Application Issues

1. Electronic Filing

58. *Background*. Sections 1.2105(a) and 1.2107(c) of our rules govern the filing of short-form and long-form applications.[149] In recent auctions, we have allowed applicants to file their applications either manually or electronically and required applicants to submit exhibits to short-form and long-form applications that were filed manually on a 3.5 inch diskette in ASCII text (.txt) format. Only applicants that have filed their short-form applications electronically have been allowed to bid electronically from remote locations; applicants filing manually have been required to bid telephonically. In the Notice, we tentatively concluded that Sections 1.2105(a) and 1.2107(c) of our rules should be amended to require electronic

[147] Partitioning and Disaggregation Report and Order, 11 FCC Rcd at 21851, pp 31-36.

[148] Partitioning and Disaggregation Report and Order, 11 FCC Rcd at 21862, p 55.

[149] 47 C.F.R. ss 1.2105(a) and 1.2107(c). *See also* n.7.

filing of all short-form and long-form applications, beginning January 1, 1998.[150]

59. *Discussion*. We believe that electronic filing of all short-form and long-form applications for auctionable services is in the best interest of auction participants, as well as members of the public monitoring Commission auctions. Therefore, we amend Sections 1.2105(a) and 1.2107(c) of our rules to require electronic filing of all short-form and long-form applications, beginning January 1, 1999, unless it is not operationally feasible.[151] Although in the Notice we proposed to require electronic filing commencing January 1, 1998, we believe that this additional phase-in period before the requirement becomes effective will benefit potential bidders. The majority of the comments addressing the issue support the decision to require electronic filing.[152] For example, PageNet contends that electronic filing promotes access to applications by competing bidders, as well as the general public, by making it possible to review and download applications without traveling to FCC headquarters or contracting for photocopying of paper applications.[153] To facilitate public access, the Commission has developed user-friendly electronic filing software and Internet World Wide Web forms to give auction applicants the ability to conveniently file and review

[150] Notice at p 46.

[151] 47 C.F.R. ss 1.2105(a) and 1.2107(c).

[152] See, e.g., AT&T Comments at 2; PageNet Comments at 16; AMTA Comments at 11.

[153] PageNet Comments at 16.

applications.[154] This software helps applicants ensure the accuracy of their applications as they are filling them out, and enables them to correct errors and omissions prior to submitting their applications. To assist the public, we provide technical support personnel to answer questions and work with callers using the electronic auction system. In addition, the Commission has demonstrated its auction software at conferences organized by potential bidders and members of the industry in order to familiarize interested parties with our recent software enhancements.

60. AT&T is generally supportive of electronic filing, but proposes that the Commission create a waiver process whereby an applicant that has missed a filing deadline due to technical problems can obtain a waiver quickly or be permitted to submit a paper original of the application by hand or mail the same day.[155] In addition, AT&T requests that a Commission staff member be provided with the authority to grant such a waiver in the event of electronic filing difficulties.[156] We do not believe that a specific waiver provision is necessary. The Commission's existing waiver provisions, which specify the showing required for the grant of a waiver, provide adequate assurance that requests for waiver relating to the electronic

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[154] We assess no fee for filing applications electronically but currently charge $2.30 a minute for reviewing or downloading applications of other parties on line. See Assessment and Collection of Charges for FCC Proprietary Remote Software Packages, Online Communications Service Charges and Bidder's Information Packages in Connection with Auctionable Services, Report and Order, No. 95-308, 60 Fed. Reg. 38276 (July 26, 1995). The public can also download other auctions related documents for no charge from the FCC internet site (<<backslash>>http<<backslash>>www.fcc.gov).

[155] AT&T Comments at 2.

[156] *Id.*

filing of applications will receive proper consideration.[157] In addition, we emphasize that the Commission has typically responded rapidly to time-sensitive waiver requests filed by auction applicants, and we intend to continue to do so in the future.[158]

61. Only one commenter, Airadigm, opposes an electronic filing requirement. Airadigm states that the Commission experienced difficulties in processing electronic filings during the IVDS auction and argues that removing the option of manual filing could result in similar problems in future auctions.[159] We believe that the system enhancements discussed above, most of which were not in place during the IVDS auction, adequately respond to Airadigm's concerns. We also note that our experiences from recent auctions demonstrate that the electronic bidding system is reliable. For example, in the broadband PCS D, E, and F block auction, 94 percent of the qualified bidders filed their short-form applications electronically. In the recently completed 800 MHz SMR auction, 93 percent of the qualified bidders filed their short-form applications electronically. We did not experience problems with our electronic filing procedures.

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[157] *See, e.g.*, 47 C.F.R. § 24.819.

[158] See, e.g., Letter to James Hillyard, Alaskan Choice Television, L.L.C., from Kathleen O'Brien Ham, Chief, Auctions Division, Wireless Telecommunications Bureau (April 23, 1997) (responding to Alaskan Choice Television, L.L.C.'s Petition for Waiver of the Upfront Payment Deadline). *See also* Letter to Mr. John Prawat, DigiVox Telecom, Inc., from Kathleen O'Brien Ham, Chief, Auctions Division, Wireless Telecommunications Bureau, DA 97- 730 (April 11, 1997) (responding to DigiVox Telecom, Inc.'s Request for Rule Waiver of the Upfront Payment Requirement in the WCS Auction).

[159] Airadigm Comments at 9.

62. Finally, as we stated in the Notice, we recognize that there is a need for a period of time before a comprehensive electronic filing requirement becomes effective in order for bidders to prepare and be completely comfortable with this process.[160] The effective date of January 1, 1999, will provide potential bidders with adequate time in which to adapt to electronic filing requirements.[161] Finally, although we conclude that electronic filing is the preferred filing method, we nevertheless reserve the right to provide for manual filing in the event of technical failure or other difficulties.

2. Short-form Application Amendments

63. *Background.* Section 1.2105(b) of our rules addresses modifications and amendments to applicants' short-form (FCC Form 175) applications. Specifically, Section 1.2105(b)(2) provides that bidders may make minor changes or correct minor errors in the FCC Form 175 application, but that major amendments may not be submitted after the initial application deadline.[162] This section further provides that the Commission will classify all amendments as major or minor pursuant to service-specific rules.[163] In the Notice, we proposed to amend our general auction rules to create a uniform definition for major amendments to FCC Form 175 for all auctionable services.[164] We proposed at a minimum to consider any change

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[160] Notice at p. 46.

[161] We note that this phase-in period is similar to the approach taken by the Securities and Exchange Commission when it eliminated paper financial filings. See 17 C.F.R.§ 232.902(a).

[162] 47 C.F.R. § 1.2105(b).

[163] *Id.*

[164] Notice at p 48.

in ownership that constitutes a change in control to be a major amendment. We also proposed to consider application amendments that show a change in an applicant's size which would affect its eligibility for small business provisions as a major amendment.[165] Finally, we sought comment on what other kinds of changes should be deemed major or minor.[166]

64. We also indicated in the Notice that in previous auctions, applicants have claimed that they made mistakes in their license selection and have requested that the Commission allow them to add or delete license selections during the resubmission period.[167] While the Bureau has generally refused to grant these requests in order to prevent collusive conduct or gaming that would reduce the competitiveness of the auction, we recognized that there may be some circumstances in which the competitiveness of the auction might be enhanced by allowing applicants to add licenses to their FCC Form 175 applications. We sought comment on whether an amendment to add licenses should be permissible as a minor amendment.[168] We also asked whether such an amendment should be permitted only until the deadline for submitting upfront payments, because after that point the risks of gaming in the auction increase due to the availability of information concerning each bidder's eligibility.[169]

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[165] *Id.*

[166] *Id.*

[167] *Id.* The Commission may provide a limited opportunity, after the deadline for filing short-form applications has passed, for applicants to correct minor defects and then resubmit their corrected applications. The decision as to whether to provide such a resubmission period is made on a service-by-service basis.

[168] *Id.*

[169] *Id.*

65. *Discussion*. The majority of commenters support our proposal in the Notice to create a uniform definition of major and minor amendments to applicants' short-form (FCC Form 175) applications for all future auctions.[170] However, commenters' opinions differ on what types of amendments the Commission should categorize as major or minor. For example, AT&T and ISTA argue that major amendments should include all changes in ownership that constitute a change in control, as well as all changes in size that would affect an applicant's eligibility for designated entity provisions.[171] In contrast, Metrocall contends that all changes in ownership incidental to mergers and acquisitions, non-substantial pro forma changes, and involuntary changes in ownership should be categorized as minor.[172] Metrocall also states that an applicant should not be permitted to upgrade its designated entity status after the short form filing deadline (i.e., go from a "small" to "very small" business), but should be permitted to lose its designated entity status as a result of a minor change in control (i.e., exceed the threshold for eligibility as a small business).[173]

66. After careful consideration of the comments addressing the issue, we believe that a definition of major and minor amendments similar to that provided in our PCS rules,[174] is appropriate. After the short-form filing deadline, applicants will be permitted to make minor amendments to their short-

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[170] See Airadigm Comments at 9; AT&T Comments at 2-3.

[171] AT&T Comments at 2-3; ISTA Commetns at 2.

[172] Metrocall Comments at 6-7.

[173] *Id.* at 8.

[174] 47 C.F.R. § 24.822.

form applications both prior to and during the auction. However, applicants will not be permitted to make major amendments or modifications to their applications after the short-form filing deadline. Major amendments will include, but will not be limited to, changes in license areas designated on the short-form application, changes in ownership of the applicant which would constitute a change in control, and the addition of other applicants to any bidding consortia. Consistent with the weight of the comments addressing the issue,[175] major amendments will also include any change in an applicant's size which would affect an applicant's eligibility for designated entity provisions. For example, if Company A, an applicant that qualified for special provisions as a small business, merges with Company B during the course of an auction, and if, as a result of this merger, the merged company would not qualify as a small business, the amendment reflecting the change in ownership of Company A would be considered a major amendment. Otherwise, the new entity could receive small business bidding credits and installment payments when it does not qualify for them. As is the case in our PCS rules, however, applicants will be permitted to amend their short-form applications to reflect the formation of bidding consortia or changes in ownership that do not result in a change in control of the applicant, provided that the parties forming consortia or entering into ownership agreements have not applied for licenses in any of the same geographic license areas.[176] In contrast, minor amendments will include, but will not be limited to, the correction of typographical errors and other minor defects, and any amendment not identified as major.

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[175] *See* AT&T Comments at 2-3; ISTA Commets at 2. *See also* Metrocall Comments at 8.

[176] *See* 47 C.F.R. § 1.2105(c).

67. As noted above, the Commission has generally refused to grant requests to add or delete markets on an applicant's short-form application in order to prevent collusive conduct or gaming that would reduce the competitiveness of the auction. While we recognize that there may be some circumstances in which the competitiveness of the auction might be enhanced by allowing applicants to add markets to their short-form applications, we conclude that the risks of encouraging or facilitating conduct that negatively affects the competitiveness of the auction and the post-auction market structure outweigh the benefits of categorizing such amendments as minor. Several commenters support this conclusion that the addition or deletion of markets on the short-form application should always be deemed a "major" amendment.[177] Specifically, PageNet states that because the only new information that an applicant could be deemed to possess at this stage would be licenses on which other applicants intend to bid, amendment of the short-form application in this regard could only lead to auction abuses.[178] Those commenters supporting defining the addition or deletion of markets after the short-form filing deadline as a minor amendment argue that such an amendment should only be permitted prior to the upfront payment deadline or the release of the Public Notice announcing qualified bidders.[179] After this point, the overall competitiveness of the auction may be threatened.[180]

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[177] *See* ISTA Comments at 2; PageNet Comments at 8-9.

[178] PageNet Comments at 8.

[179] *See* PCIA Comments at 3-4; AirTouch Comments at 5-6; Airadigm Comments at 9-10.

[180] *See, e.g.,* AirTouch Comments at 5-6 and Reply Comments at 6.

68. AT&T proposes that the deletion of markets to avoid specifying markets that overlap with another auction application (and thus preventing discussion on potentially non-auction-related matters such as interconnection, resale, and equipment orders that do not affect bids or bidding strategies) be deemed a minor amendment.[181] We note that in previous auctions some applicants have inadvertently placed themselves at risk of violating the Commission's anti-collusion rule by choosing to specify "all markets" on their short-form applications when they intended to bid only on a particular license or group of licenses. As a general matter, the anti-collusion rule does not prohibit non- auction-related business negotiations between auction applicants that have applied for the same geographic service areas.[182] AT&T argues that the aspect of the rule prohibiting the addition or deletion of markets often has had the unfortunate result of discouraging non-auction, business-related discussions between auction applicants who are not actually bidding for licenses in the same geographic license areas.[183] Because of the potential anti-competitive results of allowing bidders to delete markets after the short-form filing deadline, however, we believe that this type of error can be more effectively addressed by other means, including increased awareness on the part of prospective auction applicants of the consequences of choosing "all markets," as well as software enhancements that make specifying particular markets on the FCC Form 175 less burdensome.

69. We also emphasize that, pursuant to Section 1.65 of

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[181] AT&T Comments at 2-3.

[182] *See* Letter from Kathleen O'Brien Ham, FCC, to David L. Nace, DA 96-1566, Sept. 17, 1996, at 1-2.

[183] AT&T Comments at 2-3.

the Commission's rules, each auction applicant is required to assure the continuing accuracy and completeness of information furnished in a pending application.[184] Each applicant is therefore under a continuing obligation to update its short-form and long-form applications as appropriate to reflect any changes that would make a pending application inaccurate or incomplete, or that are necessary to determine that an applicant is in compliance with our rules.[185] As in all prior auctions, an application that is amended by a major amendment will be considered newly filed, and therefore will not be accepted after the short-form filing deadline.[186] We further note that the Commission has waived its ex parte rules as they apply to the submission of amended short-form applications to maximize applicants' opportunities to seek the advice of Commission staff when making amendments at any time after the short-form filing deadline.[187]

70. Finally, we note that in the context of cellular unserved area licensing, WWC contends that the rules adopted in this proceeding addressing major and minor amendments to short-form applications should not apply to cellular unserved area applications filed in 1994 as these applications were to be

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[184] 47 C.F.R. § 1.65.

[185] See, e.g., Letter to Linda Feldmann from Kathleen O'Brien Ham, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, DA 97-2261 (rel. October 24, 1997).

[186] See 47 C.F.R.§ 1.2105(b)(2).

[187] See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Second Order on Reconsideration and Seventh Report and Order, PP Docket No. 93-253, 11 FCC Rcd 2639, 2679, p 104 (1995), and "Commission Announces that Mutually Exclusive "Short-Form" Applications (Form 175) to Participate in the Competitive Bidding Process ("Auctions") Are Treated as Exempt for Ex Parte Purposes," Public Notice, 9 FCC Rcd 6760 (1994).

governed by a "letter-perfect" standard and applicants were given no opportunity to cure minor defects.[188] While we have considered WWC's argument, we believe that it is inapplicable. WWC addresses the initial application procedures for cellular unserved area licenses, while the Part 1 rules, in contrast, address application procedures for participation in an auction once a finding of mutual exclusivity has been made.

3. Ownership Disclosure Requirements

71. *Background.* Currently, our general competitive bidding rules do not set forth any ownership disclosure requirements for auction applicants on their short-form applications. As we recognized in the Notice, however, our service-specific rules require varying degrees of specific ownership information from applicants.[189] For example, in the 900 MHz SMR auction, an applicant claiming small business status was required to disclose on the short-form application the names of each affiliate and a gross revenues calculation. On the long-form application, such an applicant was required to disclose an additional gross revenues calculation, any agreements that support small business status, and any investor protection agreements.[190] At the same time, both our narrowband PCS and broadband PCS rules require detailed ownership disclosure from all auction applicants that differ from each other and from the 900 MHz SMR requirement. Rules for narrowband and broadband PCS also impose additional requirements for applicants claiming small business status. Finally, although the broadband PCS disclosure

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[188] WWC Comments at 2-3.

[189] Notice at pp 49-50.

[190] 47 C.F.R. § 90.815(b).

requirements are very similar to those for narrowband PCS, we have recently amended the broadband PCS application requirements to make them less burdensome on applicants.[191]

72. In the Notice, we sought comment on whether to adopt standard ownership disclosure requirements for all auctionable services in order to eliminate these inconsistencies from service to service.[192] Specifically, we proposed to adopt standard disclosure requirements that are similar to our current rules for broadband PCS. We sought comment on what ownership information should be required.[193] We also proposed to adopt a uniform reporting requirement for all applicants claiming small business status, and proposed to model this requirement on the 900 MHz SMR rules.[194]

73. *Discussion*. As we indicated in the Notice, we continue to believe that detailed ownership information is necessary to ensure that applicants claiming small business status qualify for such status, and to ensure compliance by all applicants with spectrum caps and other ownership limits.[195] Disclosure of ownership information also aids bidders by providing them with information about their auction competitors and alerting them to entities subject to our anti-collusion rules. Therefore, we adopt standard ownership disclosure requirements for all auctionable services that will avoid the variations found in our current service-specific

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[191] 47 C.F.R. § 24.813.

[192] Notice at p. 51.

[193] *Id.*

[194] 900 MHz SMR Report and Order; Bidder Information Package for 900 MHz SMR (November 28, 1995).

[195] Notice at p. 51.

ownership disclosure requirements.

74. This decision is widely supported by the majority of comments in this proceeding. Most commenters addressing the issue of ownership disclosure support requiring some level of ownership information at the short-form application stage.[196] For example, PCIA believes that full disclosure of bidder ownership information is necessary if competing bidders are to accurately assess the legitimacy of their auction opponents and their respective bids.[197] PCIA contends that there can be no valid reason for legitimate bidders to hide their ownership. Such information, according to PCIA, is crucial for purposes of the Commission's anti-collusion rules, spectrum caps, and other ownership limits.[198] Similarly, PageNet contends that full ownership disclosure is important to aid bidders in compiling information about their auction competitors and, most importantly, to alert them to any conduct that might be a violation of the Commission's anti- collusion rules.[199] In the satellite context, Hughes argues that the submission of detailed ownership information is essential because of the extreme costs associated with the build-out of a satellite system.[200] In contrast, only CII argues that the Commission's objectives with regard to the rules governing designated entity status, spectrum caps, and other ownership limitations would be fully satisfied by deferring the filing of comprehensive ownership information

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[196] *See* PCIA Comments at 4, ISTA Comments at 2; PageNet Comments at 2-3; Hughes Comments at 6-7.

[197] PCIA Comments at 4.

[198] *Id.* at 4. *See also* ISTA Comments at 2.

[199] PageNet Comments at 2-3.

[200] Hughes Comments at 6-7.

until the long-form application stage.[201]

75. For all future auctions, therefore, we will model our reporting requirements on the general application requirements contained in our broadband PCS rules.[202] Under this standard, all auction applicants will be required to disclose the real party or parties in interest by including as an exhibit to their short-form applications detailed ownership information. Although our current Part 1 rules require auction applicants to list all owners of a five percent or greater interest in the applicant, we agree with commenters such as CII that argue that applicants should not be required to list all holders of this small an interest in the applicant, unless they are in a position of control by virtue of other factors (i.e., voting agreements, management structure), or hold a significant passive ownership interest (i.e., 20 ,ercent).[203] Thus, we amend our rules to require that applicants list controlling interests as well as all parties holding a 10 percent or greater interest in the applicant and any affiliates of these interest holders.[204] A 10 percent or greater interest reporting requirement is consistent with the revised definition of the term "applicant" we adopt for purposes of the anti-collusion rule (See Section III.F, infra). We note that PageNet contends that the Commission should require disclosure of entities and individuals that own more than five percent of the applicant or who have provided more than five percent of the applicant's equity.[205] However, as suggested above, we believe that the detailed reporting requirement we

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[201] CII Comments at 13-14.

[202] *See* 47 C.F.R. § 24.813.

[203] CII Comments at 14-15.

[204] *See* 47 C.F.R. § 1.2110(b)(4).

[205] Id at 6.

create today, in combination with our comprehensive affiliation rules (see Section III.B.3, *supra*), permits us to determine the "real party or parties in interest"[206] when parties apply to participate in an auction.

76. Specifically, all auction applicants will be required to disclose: (1) a list of any FCC-regulated business, 10 percent or more of whose stock, warrants, options or debt securities are owned by the applicant; (2) a list of any party holding a 10 percent or greater interest in the applicant, including the specific amount of the interest; (3) a list of any party holding a 10 percent or greater interest in any entity holding or applying for any FCC- regulated business in which a 10 percent or greater interest is held by another party which holds a 10 percent or greater interest in the applicant (e.g., if company A owns 10% of company B (the applicant) and 10% of company C, a company holding or applying for an FCC-regulated business, the companies A and C must be listed in company B's application); (4) the name, address and citizenship of any party holding 10 percent or more of each class of stock, warrants, options or debt securities, together with the amount and percentage held;[207] (5) the name, address and citizenship of all

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[206] See 47 C.F.R. § 24.813(a).

[207] For purposes of determining ownership interests, stock interests held in trust shall be attributed to (1) any person who holds or shares the power to vote such stock; (2) any person who has the sole power to sell such stock; and (3) in the case of stock held in trust, to any person who has the right to revoke the trust at will or to replace the trustee at will. If the trustee has a familial, personal, or extra-trust business relationship to the grantor or the beneficiary, the grantor or beneficiary, as appropriate, will be attributed with the stock interests held in trust (See 47 C.F.R.§ 20.6(d)(3)). Non-voting stock shall be attributed as an interest in the issuing entity if equal to or greater than 20 percent of the value of the entity (See 47 C.F.R.§ 20.6(d)(4)). Debt and instruments such as warrants, convertible debentures, options, or other interests (except non-voting stock) with rights of

controlling interests of the applicants, as this term is defined in Section 1.2110 of our rules; (6) if the applicant is a general partnership, the name, address and citizenship of each partner, and the share or interest participation in the partnership; (7) if the applicant is a limited partnership, the name, address and citizenship of each general partner and each limited partner whose interest in the applicant is equal to or greater than 10 percent (as calculated according to the percentage of equity paid in and the percentage of distribution of profits and losses); (8) if the applicant is a limited liability corporation, the name, address and citizenship of each of its members; and (9) a list of all parties holding indirect ownership interests in the applicant, as determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain, that equal 10 percent or more of the applicant, except that if the ownership percentage for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated and reported as if it were a 100 percent interest.[208]

77. In addition, consistent with the reporting requirements set forth in the 900 MHz SMR rules,[209] we will require that applicants claiming small business status disclose on their short-form applications the names of each controlling interest and affiliate, as these terms are defined in this proceeding, and to provide gross revenues calculations for each. On their long-form applications, such applicants will be required to disclose any additional gross revenues calculations, any agreements that support small business status, and any investor protection agreements. We believe that these reporting requirements will

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conversion to voting interests must treated as if fully exercised.

[208] See, e.g., 47 C.F.R. § 20.6(d)(8).

[209] 900 MHz SMR Report and Order; Bidder Information Package for 900 MHz SMR (November 28, 1995).

help to assure that only qualifying applicants obtain the benefits of our small business provisions, without being unduly burdensome.

78. Finally, in a related proposal, PageNet states that Commission should expressly prohibit "blind bidding" (i.e., bidding in which auction participants do not know the identities or ownership information of the other bidders in the auction) in any pending and future auction because it (1) is unfair to auction participants; (2) encourages auction abuses; and (3) encourages speculation.[210] PageNet contends that these factors can have a significant impact upon the competitiveness of the auction and the post-auction marketplace.[211] In situations in which an incumbent has already met the Commission's build-out requirements and must still bid in an auction in which blind bidding is used, PageNet contends that a competitor is often able to bid up the price of a license that it never intends to win in order to force the incumbent to buy the license at a higher price. PageNet further contends that this higher price is then reflected in higher rates for services, which in turn affect the incumbent's ability to compete.[212] As discussed above, we agree that it is important that auction applicants disclose certain ownership information prior to the start of an auction. At the same time, however, we believe that in certain circumstances, the competitiveness of an auction may be increased if less bidder information is made available. In the *Competitive Bidding Second Memorandum Opinion and Order*, we retained the flexibility to conceal bidder identities if further experience

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[210] *Id.*

[211] *Id.* at 4/

[212] *Id.*

showed that it would be desirable to do so.[213] More recently, in the auction rules for geographic area paging licenses, the Commission concluded that the advantages of limiting information disclosed to bidders outweigh the disadvantages of this approach, and reserved the discretion to announce by Public Notice prior to the auction the precise information to be revealed to bidders during that auction.[214] We believe that the uniform rules we adopt today provide us with the necessary flexibility to tailor the amount of bidder information made available to applicants to ensure the competitiveness of each auction. We therefore decline to adopt a provision prohibiting non-disclosure of bidder identities in all future auctions.

4. Ownership Disclosure Filings

79. *Background.* Currently, the Commission's ownership disclosure rules require applicants to file specific ownership information in conjunction with their FCC Form 175 applications prior to each auction.[215] Similarly, at the close of each auction, winning bidders are required to file ownership information on each long-form application.[216] In the Notice, we tentatively concluded that we should permit applicants to file ownership information to apply for the first auction in which they participate, and we would store this information in a central database which would be updated each time applicants

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[213] See *Competitive Bidding Second Memorandum Opinion and Order*, 9 FCC Rcd at 7252, p 42.

[214] See Paging *Second Report and Order* and Further Notice of Proposed Rule Making, 12 FCC Rcd at 2803, p 160.

[215] See 47 C.F.R.§ 1.2105(a)(2). *See also* FCC Form 175 pp 1-5, 8-10, certification and exhibit requirements (October 1995).

[216] See 47 C.F.R. ss 1.2107(c) - (d). *See also*, FCC Form 601 pp 1-16, 29-33, and 39 (January 1995).

participate in another auction.[217] We proposed that an applicant filing for a subsequent auction would either update the ownership information in the database, or certify that there have been no changes in ownership status.[218]

80. *Discussion.* We believe that permitting applicants to file ownership information when they apply for their first auction, which would then be stored in a central database and updated each time the information changes during or after the first auction and when applicants participate in a subsequent auction, will streamline our application processes and minimize the burden on auction applicants. This concept is supported by the record.[219] For example, CII and Airadigm argue that this approach will benefit auction applicants by reducing the time spent preparing auction applications, and will benefit the Commission by eliminating the need to review and analyze duplicative filings.[220] We believe that by requiring ownership disclosure filings, we ensure that we receive all the information necessary to evaluate an applicant's qualifications. As we indicated in the Notice, however, these requirements could result in duplicative filings.[221] For example, where licenses for a service are offered in a series of blocks, as in the case of broadband PCS, an entity may wish to participate in several auctions, and would be required to disclose the same information a number of times.[222] Under the system we

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[217] Notice at p. 54.

[218] *Id.*

[219] See AMTA Comments at 11-12; Airadigm Comments at 10; Hughes Comments at 7; ISTA Comments at 2; CII Comments at 15.

[220] See CII Comments at 15; Airadigm Comments at 11.

[221] Notice at p 54.

[222] 47 C.F.R. ss 24.413, 24.709(c) and 24.813.

envision, when applying to participate in subsequent auctions, applicants will be permitted to update the database or certify that there have been no changes in ownership and that the information contained in the database remains correct. We will look to implement this process in the near future as part of our Universal Licensing System.[223]

5. Audits

81. *Background.* Under our broadband PCS auction rules, we have reserved the right to conduct random audits of auction applicants and licensees in order to verify information provided regarding their eligibility for certain special provisions.[224] These rules require that entities certify their consent to such audits on their short-form applications.[225] In the Notice, we proposed to explicitly reserve this right for all auctionable services.

82. *Discussion.* The only commenters to address this proposal, PageNet and Airadigm, support this proposal.[226] Airadigm requests that applicants and licensees subject to audit be afforded sufficient time to provide information to the Commission and that the Commission issue written findings following its examination.[227] We therefore adopt our proposal, and will modify our rules governing status as a designated

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[223] See generally "Wireless Telecommunications Bureau Universal Licensing System Registration Now Available," Public Notice (rel. November 4, 1997).

[224] 47 C.F.R. § 24.709(d).

[225] *Id.*

[226] PageNet Comments at 9.

[227] Airadigm Comments at 11-12.

entity to expressly provide that applicants and licensees claiming eligibility for special provisions shall be subject to audits by the Commission. Such audits will be governed by the standards set forth in Sections 403 and 308(b) of the Communications Act.[228] We believe that these provisions, as well as the general provisions of the Administrative Procedure Act,[229] will adequately address Airadigm's concerns, and we therefore decline at this time to adopt specific rules to govern audits of applicants and licensees conducted in the future.

D. Payment Issues

1. Determination of Upfront Payment Amount

83. *Background.* Section 1.2106 of our rules provides that the Commission may require applicants for licenses subject to competitive bidding to submit an upfront payment in order to be eligible to bid in an auction.[230] Although not specifically addressed in the Notice, we received significant comment on the proper upfront payment to be required for participation in future auctions.

84. *Discussion.* In the *Competitive Bidding Second Report and Order*, we indicated that the upfront payment should be set using a formula based upon the amount of spectrum and population (or "pops") covered by the license or licenses for which parties intend to bid.[231] We reasoned that this method of

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[228] 47 U.S.C.§§ 403, 308(b).

[229] See 5 U.S.C. § 551 *et seq.*

[230] 47 C.F.R.§ 1.2106(a). *See also* 47 C.F.R.§ 1.2110(g).

[231] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2377, p 169.

determining the required upfront payment would enable prospective bidders to tailor their upfront payment to their bidding strategies.[232] At the same time, however, we noted that determining an appropriate upfront payment involved balancing the goal of encouraging bidders to submit serious, qualified bids with the desire to simplify the bidding process and minimize implementation costs imposed on bidders.[233] We concluded that the best approach would be to maintain the flexibility to determine the amount of the upfront payment on an auction-by-auction basis, because this balancing may yield different results depending upon the particular licenses being auctioned.[234]

85. Many commenters make specific proposals regarding the proper size and terms for assessing upfront payments in future auctions. For example, PageNet and CII suggest that the Commission adopt a standard upfront payment rule requiring separate upfront payments for each license identified in an applicant's short-form application.[235] CII contends that this would reduce the number of "phantom" mutual exclusivities (i.e., theoretical frequency conflicts caused by the fact that the current auction rules create no financial disincentive to list licenses in an application on which the applicant has no bona fide intention to bid).[236] In contrast, Airadigm and NPCS argue that the Commission should not require a separate upfront payment for each license on which an entity elects to bid, as this would limit bidders' flexibility to change strategy and force

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[232] *Id.*

[233] *Id.* at 2378.

[234] *Id.*

[235] PageNet Comments at 11; CII Comments at 11.

[236] CII Comments at 11-12.

them to reveal their bidding strategy prior to the start of the auction.[237] In an alternate proposal, AirTouch and CII suggest that the Commission require applicants to increase their upfront payments as an auction progresses to equal a percentage of their total bids.[238] AirTouch argues that this requirement would reduce the risk of defaults and discourage parties from submitting "jump bids" where they have no intention of actually winning a particular license.[239] Similarly, to reduce the risk of default, CII recommends that when an applicant's upfront payment drops below a specific percentage of its high bid amount, the Commission allow the applicant to increase its deposit to a certain percentage of its high bid total within ten business days.[240] In contrast to these two proposals, Airadigm opposes increasing the upfront payment requirement once a bidder's bid amount exceeds a certain multiple of the original upfront payment amount because this would create a significant barrier to small businesses.[241]

86. We agree with Airadigm and NPCS that it is unnecessary to adopt additional rules governing the amount of the upfront payment and the terms under which it is assessed. We believe that our reasoning in the *Competitive Bidding Second Report and Order* remains valid, and that the required upfront payment should be tailored to the particular auction design and to the characteristics of the licenses being

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[237] Airadigm Reply Comments at 7; NPCS Reply Comments at 5-6.

[238] AirTouch Comments at 6 and Reply Comments at 2-3; CII Comments at 10-11.

[239] AirTouch Comments at 6 and Reply Comments at 2-3.

[240] CII Comments at 10-11.

[241] Airadigm Reply Comments at 6.

auctioned.[242] This determination can be made in a variety of ways and using a variety of techniques to estimate the value of the spectrum being auctioned; however, as a general rule we have required an upfront payment equal to $0.02 per pop per megahertz. As discussed *infra*, under the current competitive bidding rules the Commission maintains the discretion to alter the amount of the required upfront payment or to modify the terms under which the upfront payment is assessed.[243] We believe that retaining this discretion provides the Commission with the greatest level of flexibility to determine the appropriate upfront payment amount on an auction-by-auction basis.

2. Refund of Upfront Payments

87. *Background.* Section 309(j)(8)(C) of the Communications Act requires that any deposits the Commission may require for the qualification of any person to bid in an auction shall be deposited into an interest bearing account.[244] The Communications Act further requires that within 45 days of the auction's conclusion, the deposits of successful bidders shall be paid to the United States Department of Treasury ("Treasury"), the deposits of unsuccessful bidders shall be returned, and all accrued interest shall be transferred to the Telecommunications Development

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[242] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2377, p 170.

[243] See, e.g., LMDS *Second Report and Order*, 12 FCC Rcd at 12545, p 330.

[244] 47 U.S.C.§ 309(j)(8)(C). This provision was added by the Telecommunications Act of 1996, Pub. L. No. 104-104,§ 3, 110 Stat. 56 (1996).

Fund ("TDF").[245] Prior to the enactment of this provision, auction proceeds were deposited in a non- interest bearing account with the U.S. Treasury. The Commission has permitted bidders who completely withdraw during the auction to receive a refund of their upfront payments prior to the close of the auction, upon written request. In the Notice, we sought comment on whether this practice should be continued.[246]

88. *Discussion.* After considering the issue in light of Congress's 1996 amendment to Section 309(j)(8)(C) and the comments received in this proceeding, we will continue our current practice of returning the upfront payments of bidders who have completely withdrawn from an auction prior to the conclusion of competitive bidding. As we suggested in the Notice, it is unclear whether Congress intended, in amending Section 309(j)(8)(C), to require the Commission to change its practice of refunding upfront payments to bidders who withdraw during the course of an auction.[247] We continue to believe, however, that the prompt return of upfront payments is in the public interest, because it prevents unnecessary encumbrances on the funds of auction bidders, many of whom may be small businesses, after they have withdrawn from the auction. In addition, we believe that this practice minimizes the financial burdens of participating in an auction, because auction participants earn no interest on upfront payment funds on deposit with the Commission. Moreover, all commenters addressing the issue support our proposal to continue this

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[245] *Id.*

[246] Notice at p 57.

[247] *Id.*

practice.[248] AirTouch proposes that the Commission retain an administrative fee based upon the number of rounds an applicant has remained in the auction when it refunds upfront payments to bidders who have withdrawn.[249] Airadigm and AT&T state that not returning upfront payments in a prompt manner in circumstances where a bidder has withdrawn is akin to a "fee" that Congress did not intend to authorize, and that may work to discourage participation in the Commission's auction program.[250] We agree with Airadigm and AT&T, and conclude that such a fee is inappropriate, and therefore, we reject AirTouch's proposal.

3. Down Payment and Full Payment for Licenses

a. Level of Down Payments

89. *Background.* Previously, the Commission required a winning bidder to submit additional funds as necessary to bring its total deposits up to 20 percent of its high bid(s) within five business days after being notified that it is a high bidder on a particular license.[251] In the Order accompanying the Notice, we modified our rules to establish a due date for down payments of ten business days after the issuance of a Public Notice announcing winning bidders.[252] In the Notice, we proposed to retain discretion to determine the down payment amount

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[248] See AT&T Comments at 3-4; AirTouch Comments at 7; Airadigm Comments at 12 and Reply Comments at 8; AMTA Comments at 12; CII Comments at 15-16; ISTA Comments at 2 and Reply Comments at 3.

[249] AirTouch Comments at 7.

[250] Airadigm Reply Comments at 8-9; AT&T Comments at 3-4.

[251] 47 C.F.R. §1.2107(b).

[252] See Notice at p 14.

required for each service and to delegate this authority to the Bureau, which will announce this amount in a Public Notice to be issued prior to the start of each auction.[253] We also noted that in an effort to help to determine the appropriate down payment amount for a particular service, the Bureau will seek input from the public. We also sought comment on whether the level of down payments used in the past should be raised for some services.[254]

90. *Discussion.* We created the down payment requirement in the *Competitive Bidding Second Report and Order*, in which we concluded that at the conclusion of the auction, a bidder must tender a significant and non-refundable down payment to the Commission over and above its upfront payment in order to provide further assurance that the winning bidder will be able to pay the full amount of its winning bid.[255] We believe that a substantial down payment is required to ensure that licensees have the financial capability to attract the capital necessary to deploy and operate their systems, and to protect against default. Because it is due soon after the close of the auction, the down payment is a valuable indicator of a license applicant's financial viability. In addition, we believe that it is important that we learn early on in the licensing process when an applicant might be unable to finance its winning bid or bids.

91. Several commenters oppose any increase in the down

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[253] Notice at p 59.

[254] *Id.*

[255] *Competitive Bidding Second Report and Order*, 9 FCC Rcd 2348, 2381, pp 189-92.

payment beyond 20 percent of the high bid amount.[256] Airadigm opposes granting the Bureau the discretion to establish a down payment amount because it believes that the Bureau could unfairly disadvantage small businesses by requiring disproportionately large down payments for auctions of particularly capital- intensive services.[257] In addition, Airadigm states that granting the Bureau this discretion could complicate applicants' financing arrangements because down payment amounts could vary with each auction. After consideration of these comments, we conclude that a standard down payment amount of 20 percent is appropriate. Finally, if unusual circumstances present themselves in the context of a particular service, the Commission reserves the right to adopt a different amount by rule in that service.

b. Untimely Second Down Payments and Full Payments

92. *Background.* Section 1.2109(a) of the Commission's rules[258] provides that auction winners not eligible for installment payments are generally required to make final payment on their license(s) within a certain time following award of the license(s). Similarly, Section 1.2110(e) of the Commission's rules[259] provides that all winning bidders eligible for installment payments are required to submit a second down payment within a certain period after conditional license grant. These payment deadlines are announced by public notice when

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[256] See CII Comments at 10, Merlin Comments at 12; AMTA Comments at 9; Airadigm Comments at 12; NPCS Reply Comments at 5.

[257] Airadigm Comments at 12.

[258] 47 C.F.R. §1.2109(a).

[259] 47 C.F.R. §1.2110(e).

the Commission is prepared to grant the license(s). Where a winning bidder fails to make its final auction payment for the balance of its winning bid in a timely manner, it is considered in default on its license(s) and subject to the applicable default payment.[260] In the Notice, we proposed to allow winning bidders to make their final payments or second down payments within a short period after the applicable deadline, provided that they also pay a late fee.[261] We also sought comment on our tentative conclusion that if a winning bidder misses the final payment or second down payment deadline and also fails to remit the required payment and the applicable late fee by the end of the late payment period, it would be declared in default and subject to the applicable default payments.[262] Additionally, we sought comment on whether a late payment of five percent of the amount due is an appropriate late payment fee, and asked that commenters proposing alternative late payment fee(s) provide a rationale for the alternative fee amount(s).[263] Finally, we sought comment on the appropriate time period toallow late second down payments and final payments.[264]

93. *Discussion.* We will amend Sections 1.2109(a) and 1.2110(e) of our rules to permit auction winners to make their second down payments or final payments within ten business days after the applicable deadline, provided that they also pay an appropriate late fee, without being considered in default. As we recognized in the Notice, in past auctions there have been cases where a winning bidder missed the applicable second

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[260] 47 C.F.R. ss 1.2104(g), 1.2107(c).

[261] Notice at p 61.

[262] *Id.*

[263] *Id.* at p 62.

[264] *Id.* at p 61.

down payment deadline but subsequently made its down payment and filed a request seeking a waiver of the deadline. In some of these cases, the Bureau granted the waivers, subject to payment of a five percent late fee. In granting the waivers, the Bureau recognized the licensee's good faith and ability to pay as evidenced by its timely remittance of all earlier payments and prompt action to cure the delinquency.[265]

94. We recognize that applicants may encounter unexpected or unforeseeable difficulties when trying to arrange financing and make substantial payments under strict deadlines. In circumstances that may warrant favorable consideration of a waiver request or an extension of the payment date, we must also evaluate the fairness to other licensees who made their payments in a timely fashion. Two commenters, Mountain Solutions, Ltd. ("Mountain Solutions") and AirTouch, the only commenters to address this issue in detail, support our proposal to permit late payment subject to a standard late fee for any licensee not able to make a timely payment.[266] We agree, and

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[265] See, e.g., Roberts-Roberts & Associates, Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Various BTA Markets, Order, DA 97-252, (rel. February 4, 1997); Longstreet Communications International, Inc., Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Market B012, Order, DA 97- 251 (rel. February 4, 1997). But see Styles Interactive, Inc. -- Application for Review of Denial of Petition for Reconsideration Seeking Waiver of IVDS Final Down Payment Deadline, Memorandum Opinion and Order, FCC 97-390 (rel. October 28, 1997) and Mountain Solutions LTD, Inc. Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Market Nos. B053, B168, B172, B187, B188, B224, B247, B275, B366 and B381, Order, DA No 97-891 (rel. April 28, 1997) recon pending (denying requests for waiver of the second down payment deadline).

[266] See Mountain Solutions Comments at 2 and Reply Comments at 2-3; AirTouch Comments at 7-8.

amend Section 1.2109(a) to permit winning bidders who are required to make final payment on their licenses within a certain period of time as announced by public notice, to submit their payment 10 business days after the payment deadline, provided that they also pay a late fee equal to five percent of the amount due. Although we suspend the use of installment payments for the immediate future, in the event the Commission once again offers installment payments, we also amend Section 1.2110(e) to permit auction winners paying for the licenses in installments to submit their second down payment 10 business days after the payment deadline, provided they also pay a late fee equal to five percent of the amount due.

95. As discussed above, our rules provide that winning bidders have ten business days to make timely payment following notification that their licenses are ready to be granted. We believe that in establishing this additional ten business day period, during which winning bidders will not be considered in default, we provide an adequate amount of time to permit winning bidders to adjust for any last-minute problems. We decline to provide for a lengthier late payment period because we believe that extensive relief from initial payment obligations could threaten the integrity, fairness, and efficiency of the auction process. As we observed in the Notice, a late fee of five percent is consistent with general commercial practice and provides some recompense to the federal government for the delay and administrative or other costs incurred.[267] In addition, we believe that a five percent fee is large enough to deter winning bidders from making late payments and yet small enough so as not to be punitive.[268] Therefore, applicants who

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[267] Notice at p 62. See, e.g., Eldon H. Reiley, Guidebook to Security Interests in Personal Property, at § 4.02(iii) (1989).

[268] Mountain Solutions Comments at 2 and Reply Comments at 3.

do not submit the required final payment and five percent late fee within the 10- day late payment period will be declared in default, and will be subject to the default payment specified in Section 1.2104(g) of our rules.[269]

96. Finally, we emphasize that our decision to permit late payments is limited to payments owed by winning bidders who have submitted timely initial down payments. We continue to believe that the strict enforcement of payment deadlines enhances the integrity of the auction and licensing process by ensuring that applicants have the necessary financial qualifications. In this connection, we believe that the bona fide ability to pay demonstrated by a timely initial down payment is essential to a fair and efficient auction process. Thus, we have not proposed to modify our approach of requiring timely submission of initial down payments that immediately follow the close of an auction. We did not propose to adopt a late payment period for down payments that are due soon after the close of the auction as we believe it is reasonable to expect that winning bidders timely remit their down payments, given that it is their first opportunity to demonstrate to the Commission their ability to make payments toward their licenses. Further, if a winning bidder defaults on its down payment on a license, the Commission can take action under Section 1.2109(b) relatively soon after the auction has closed, by, for example, re-auctioning the license or offering it to the other highest bidders (in descending order) at their final bids. Similarly, we do not allow for any late submission of upfront payments, as to do so would slow down the licensing process by delaying the start of an auction.

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[269] See 47 C.F.R. § 1.2104(g).

c. Full Payment and Petitions to Deny

97. *Background.* In the Notice, we recognized that under our current rules, winning bidders not eligible for installment payments are not required to submit the balance of their winning bids until petitions to deny filed against them are dismissed or denied and their licenses are ready to be granted.[270] Similarly, winning bidders that are designated entities paying in installments are not required to pay their second down payments until petitions to deny filed against them are dismissed or denied and their licenses are ready to be granted. In the interim, winning bidders for the same auction with no petitions filed against them are required to submit the balance of their winning bids (or, in the case of designated entities, their second down payments) earlier because their licenses are ready for grant. In the Notice, we sought comment on whether we should require all bidders that win licenses to make their full payments (or second down payments) at the same time.

98. *Discussion.* As discussed above (see Section III.B.5, *supra*), we suspend the use of installment payments as a means of financing small business participation in our auction program for the immediate future. As a result, all auction winners, including small businesses, will be required to submit the full payment owed on their winning bids shortly after a license is ready to be granted. As we suggested in the Notice, we recognize that in the past the filing of petitions to deny against a winning bidder's application(s) has often had the effect of significantly delaying the grant of the applicant's license(s), and as a result, the deadline for that applicant to submit the balance of its winning bid. However, in the Balanced Budget Act Congress granted the Commission the authority to shorten the

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[270] Notice at p 64.

petition to deny period, and as a result, to grant licenses much more rapidly.[271] As an initial matter, consistent with this legislation, we amend Sections 1.2108(b) and (c) of our rules[272] to provide that the Commission shall not grant a license earlier than seven days following issuance of a public notice by the Commission that long-form applications have been accepted for filing. Also consistent with the Balanced Budget Act, we amend this Section to provide that in all cases the period for filing petitions to deny shall be no shorter than five days. In this regard, we seek comment in this Second Further Notice of Proposed Rule Making (see *infra*) on whether there are instances in which the Commission should provide for a longer period for the filing of petitions to deny or for the grant of initial licenses in auctionable services.

99. In light of this change in our rules, we believe that the concerns discussed in the Notice regarding delays in the granting of licenses and, as a result, in the deadline for full payment are substantially reduced. While applications that are the subject of petitions to deny ordinarily take longer to resolve than uncontested applications, we believe these changes in procedure will reduce the risk of frivolous petitions being filed solely for purposes of delay, and will enhance our ability to resolve petitions expeditiously. Finally, we believe that concerns regarding delayed payment are outweighed by the risk

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[271] Balanced Budget Act,§ 3008. This provision provides as follows: ... [N]o application for an instrument of authorization for frequencies assigned under this title ... shall be granted by the Commission earlier than 7 days following issuance of a public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereto .... [T]he Commission may specify a period (no less than 5 days following issuance of such public notice) for the filing of petitions to deny any application for an instrument of authorization for such frequencies. *Id.*

[272] 47 C.F.R. §§ 1,2108(b), (c)

and uncertainty that would be imposed on an applicant if it were required to make its full auction payment while a petition against its application was still pending and could potentially result in denial of the application. As a result, we decline to amend our rules to require all winning bidders to make their full payments at the same time, regardless of whether petitions to deny their applications have been filed.

4. Default Payments

100. *Background.* Section 1.2104(g) of the Commission's rules[273] provides that when a bidder withdraws, defaults, or is otherwise disqualified from a simultaneous multiple round auction, upfront and/or down payment amounts that the bidder has on deposit with the Commission will be applied first to the bid withdrawal and default payments owed to the Commission.[274] In the past, this rule has been interpreted to

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[273] 47 C.F.R.§ 1.2104(g).

[274] See 47 C.F.R. ss 1.2104 (g)(2); 1.2106(d),(e); 1.2107(b). Specifically, Section 1.2106(e) states:

(e) In accordance with the provisions of paragraph (d), in the event a penalty is assessed pursuant to § 1.2104 for bid withdrawal or default, upfront payments or down payments on deposit with the Commission will be used to satisfy the bid withdrawal or default penalty before being applied toward any additional payment obligations that the high bidder may have.

Section 1.2106(d), cross-referenced above, states:

(d) The upfront payment(s) of a bidder will be credited toward any down payment required for licenses on which the bidder is the high bidder. Where the upfront payment amount exceeds the required deposit of a winning bidder, the Commission may refund the excess amount after determining that no bid withdrawal penalties are owed by that bidder.

Section 1.2104, also cross-referenced above, at paragraph (g)(2) states:

If a high bidder defaults or is disqualified after the close of such an auction, the defaulting bidder will be subject to the penalty in subsection (1) plus an additional penalty equal to 3 percent of the subsequent winning bid. If the subsequent winning bid exceeds the defaulting bidder's bid amount,

encompass upfront and/or down payment funds a bidder has on deposit for licenses won at the same auction.[275] In the Notice, we proposed to delete the language " simultaneous multiple-round" from Section 1.2104(g) of our rules because we believe that this means of satisfying bid withdrawal or default payments should apply to other auction designs as well as simultaneous multiple-round auctions.[276]

101. *Discussion.* We adopt our proposal to delete the words "simultaneous multiple-round" from Section 1.2104(g), and will apply the default/withdrawal payment procedure to all auction designs. Several commenters support this decision, maintaining that rigorous enforcement of the Commission's payment deadlines is critical to preserving the integrity of the auction and licensing process by ensuring that applicants

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the 3 percent penalty will be calculated based on the defaulting bidder's bid amount. These amounts will be deducted from any upfront payments or down payments that the defaulting or disqualified bidder has deposited with the Commission.

Finally, Section 1.2107(b) refers to applying upfront and down payments to satisfy penalties. See ss 1.2107(b) ("a high bidder must submit to the Commission's lockbox bank such additional funds (the 'down payment') as are necessary to bring its total deposits (not including upfront payments applied to satisfy penalties) up to twenty (20) percent of its high bid(s).... Down payments will be held by the Commission until the high bidder has been awarded the license and has paid the remaining balance due on the license, in which case it will not be returned, or until the winning bidder is found unqualified to be a licensee or has defaulted, in which case it will be returned, less applicable penalties").

[275] Public Notice, "Wireless Telecommunications Bureau Will Strictly Enforce Default Payment Rules," DA 96-481 (April 6, 1996); *Competitive Bidding Second Report and Order*, 9 FCC Rcd 2382 p 195. *See also*, CH PCS, Inc, Request for Waiver of Section 24.711(a)(2) of the Commission's Rules, DA 96-1273, 11 FCC Rcd 9343 (rel. August 9, 1996).

[276] Notice at p 67.

possess the necessary financial qualifications.[277] These commenters also suggest that default payments are an effective and necessary method of discouraging defaults and encouraging private market solutions to licensee financing difficulties.[278] We believe that this modification to our general rules governing bidder default will help to maintain the integrity of the auction process by discouraging defaults on the part of bidders, encouraging bidders to make secondary or back- up financial arrangements, and ensuring that default payments are made in a timely manner. We also believe that this modification will help to discourage insincere bidding and ensure that licenses end up in the hands of those parties that value them the most and have the financial qualifications necessary to construct operational systems and provide service.[279]

102. Our rules provide that where a winning bidder defaults on a license, the bidder becomes subject to a default payment equal to the difference between the amount bid and the winning bid the next time the license is offered by the Commission, plus a payment equal to three percent of the subsequent winning bid or the amount bid, whichever is lower.[280] In the Competitive Bidding Fifth Report and Order, the Commission stated that where the default payment cannot be determined, the Commission may assess an initial default payment "of up to 20 percent" of the defaulting bidder's

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[277] See ISTA Comments at 3; CII Comments at 16-17; Hughes Comments at 8; Airadigm Comments at 14.

[278] *Id.*

[279] See 47 U.S.C.§ 309(j)(5).

[280] See 47 C.F.R.§ 1.2104(g)(2).

winning bid.[281] We adopt our proposal in the Notice to employ this practice for all auctionable services. No commenter addressed this issue. Although the Commission provided that this deposit amount will be up to 20 percent of the defaulted bid amount, we note that if a license is reauctioned for an amount greater than the defaulted bid for the license, the default payment due will be only three percent of the defaulted bid.[282] Thus, in the future we will assess an initial default deposit of between three percent (3%) and twenty percent (20%) of the defaulted bid amount where a winning bidder or licensee defaults and the defaulted license has yet to be reauctioned. Once the license has been reauctioned by the Commission and the total default payment can be determined, the Commission will either assess the balance of the appropriate default payment, or refund any amounts due, as necessary.

5. Installment Payments

a. Late Payments

103. *Background.* Section 1.2110(e)(4)(i) of our rules provides that if an entity paying for its licenses in installments is more than ninety (90) days delinquent in any payment it shall be in default. Section 1.2110(e)(4)(ii) provides that upon default or in anticipation of default on an installment payment, a licensee may request that the Commission grant a three- to

[281] See Competitive Bidding Fifth Report and Order, 9 FCC Rcd at 5563, n. 51; Public Notice, "Wireless Telecommunications Bureau Will Strictly Enforce Default Payment Rules," DA 96-481 (April 6, 1996). *See also* CHPCS, Inc., BTA No. B347, Frequency Block C, Order, DA 96-1825 (rel. November 4, 1996) (assessing an initial default deposit equal to three percent of the total default payment).

[282] 47 C.F.R.§ 24.704(a)(2). *See also* 47 C.F.R.§ 1.2104(g).

six-month grace period, during which no installment payments need be made.[283] This rule states that in considering whether to grant a request for a grace period, the Commission may consider, among other things, the licensee's payment history, including whether the licensee has defaulted before; how far into the license term the default occurs; the reasons for default; whether the licensee has met construction build-out requirements; the licensee's financial condition; and whether the licensee is seeking a buyer under an authorized distress sale policy.[284] Under this rule, licensees are required to come before the Commission with a filing as well as financial information such as an income statement or balance sheet, in the case of financial distress, to provide the necessary information for the Commission to make its ruling. As a practical matter, licensees are then required to wait for a ruling by the Commission, or the Bureau on delegated authority, before knowing whether a grace period is granted or denied. In order to simplify these grace period procedures, we proposed to maintain our initial 90-day non-delinquency period, but to provide licensees with a subsequent automatic 90-day grace period in which to make their required payment without being considered in default.

104. We also proposed in the Notice to adopt a late payment fee schedule similar to that employed for the broadband PCS F block auction. Under this system, licensees that are late in their scheduled installment payments are assessed a late payment fee equal to five percent (5%) of the amount of the past due payment.[285] Specifically, we proposed to require that licensees taking advantage of the initial 90-day

[283] 47 C.F.R.§ 1.2110(e)(4)(ii).

[284] *Id.*

[285] 47 C.F.R.§ 24.716(c).

non-delinquency period be assessed a late fee of five percent of the late payment, and that licensees taking advantage of the subsequent automatic 90-day grace period be assessed a late fee of 10 percent (10%) of the late payment. We further proposed that the consecutive 90-day non-delinquency and grace periods (e.g., a total of 180 days in which to submit the required payment) be automatic, so that in the future licensees would not be required to file a grace period request and wait for the Commission, or the Bureau on delegated authority, to render a decision.

105. Finally, we proposed in the Notice to modify the method by which interest that accrues is amortized when a licensee fails to make a required installment payment. Section 1.2110(e)(4)(ii) of our rules provides that interest that accrues during a grace period will be amortized over the remaining term of the license.[286] In the Notice, we recognized that amortizing interest in this way has the effect of changing the amount of all future payments and requiring the Commission, or its designee, to generate a new payment schedule for the license. Changing the amount of the installment payment has, in turn, created uncertainty about the interest schedule, and increased the administrative burden on the Commission by requiring formulation of a new amortization schedule.[287] In order to avoid the potential problems associated with changing the amount of installment payments, we proposed to amend Section 1.2110(e)(4)(ii) to require that all current licensees who avail

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[286] 47 C.F.R.§ 1.2110(e)(4)(ii).

[287] *See also, Second Report and Order* and Further Notice of Proposed Rule Making, which provides for the payment of interest accrued during the period in which installment payments were suspended over eight quarterly payments. *Second Report and Order* and Further Notice of Proposed Rule Making at p 27.

themselves of the automatic grace period pay the required late fee(s), all interest accrued during the non-delinquency period, and the appropriate scheduled payment with the first payment made following the conclusion of the non-delinquency period or grace period.

106. *Discussion.* In order to add certainty to the installment payment process, we adopt our proposals from the Notice to modify our grace period provisions. As discussed above (see Section III.B.5, *supra*), we decline to use installment payments for the immediate future as a means of financing small business participation in our auction program. As a result, our decision with regard to late payment fees for installment payments effectively will apply only to existing licensees who are currently paying for their licenses in installments. From this point forward, instead of considering individual grace period requests, the following system will apply: A licensee who does not make payment on an installment obligation will automatically have an additional 90 days in which to submit its required payment without being considered delinquent, but will be assessed a five percent late payment fee as discussed above. If the licensee fails to make the required payment at the close of this first 90-day non-delinquency period, the licensee will automatically be provided a subsequent 90-day grace period, this time subject to a second, additional late fee equal to ten percent of the initial required payment.

107. As proposed in the Notice, under this system, licensees will not be required to submit a filing to take advantage of these provisions.[288] During this 90-to-180-day

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[288] We further note that the late fee is to be paid at the time the regular quarterly installment payment is made.

period, the Commission or its designated collection agent will continue to pursue collection of past-due installments and fees.[289] Also during this time, the licensee will have the opportunity to raise necessary capital, continue service and construction efforts, or seek a buyer for its license(s) that will resume payments. These late payment provisions will apply independently to all installment payments. Therefore, the late payment provisions and accompanying late fees will not affect the payment schedule for future payments. Thus, even if a licensee elects to take advantage of the late payment provisions, the licensee will still be responsible for remitting all future installment payments in a timely manner, unless the licensee elects to take advantage of the late payment provisions for any future installment payment. The following example illustrates how this system will operate:

> *ABC Corp. has a $100,000 installment interest payment due on March 1. If ABC Corp. is able to make its payment on March 1, then it must remit $100,000 to the Commission. If ABC Corp. makes its payment anytime from March 2 until May 30 (the end of the non-delinquency period), then ABC Corp. must remit $105,000 to the Commission to be considered current on its March 1 installment payment. If ABC Corp. does not make its March 1 payment by May 30, then it must remit $115,000 on or before August 28. If ABC Corp. does not remit the required $115,000 by August 29 (the end of the 90-day grace period), then it will be considered in default and its license will automatically cancel on August 30 without further*

[289] See Debt Collection Improvement Act, Pub. L. No. 104-134,§ 3100(j)(1), 110 Stat. 1321 (1996), codified at 31 U.S.C.§ 3711(a).

action by the Commission.[290]

ABC Company's June 1 installment payment of $100,000 remains due on June 1 regardless of the payment status of the March 1 payment. The late payment terms apply to June installment payment independently of the March payment. Thus, if ABC Company does not make its March 1 payment until June 1, the total amount due to the Commission on June 1 is $215,000 which consists of the March payment, the March 5% non-delinquency late fee, the March 10% grace period late fee and the June payment. Assuming the licensee remits the March 1 payment and accompanying March late fees of $115,000 to the Commission by August 29, then the total amount due to the Commission on September 1 will be $215,000 which consists of the June installment payment of $100,000, the June 5% non-delinquency late fee, the June 10% grace period late fee and September installment payment of $100,000.

ABC Company may elect to make late payments and pay the accompanying late fees on the March and June payments. However, ABC Company must remit $115,00 representing the required March payment and accompanying March late fees by August 29 (the end of March's 90-day grace period) or it will be considered in default and its license will automatically cancel on August 30 without further action by the Commission. Furthermore, ABC Company must remit and additional $115,000 representing the required June payment and accompanying June late fees by

[290] See 47 C.F.R.§ 1.2110(e)(4)(iii).

November 29 (the end of June's 90-day grace period) or it will be considered in default and its license will automatically cancel on November 30 without further action by the Commission.

As we proposed in the Notice, the late fees we adopt will accrue on the next business day following the payment due date and will be payable with the next quarterly installment payment obligation. We emphasize that at the close of non-delinquency or grace period, a licensee must submit the required late fee(s), all interest accrued during the non-delinquency period, and the appropriate scheduled payment with the first payment made following the conclusion of the non-delinquency period or grace period. Payments made at the close of any grace period will first be applied to satisfy any lender advances as required under each licensee's "Note and Security Agreement." Afterwards, payments will be applied in the following order: late charges, interest charges, principal payments. As part of our spectrum management responsibilities, we wish to ensure that spectrum is put to use as soon as possible. We also believe that licensees should be working to obtain the funds necessary to meet their payment obligations before they are due and, accordingly, that the non-delinquency and grace periods we adopt should be used only in extraordinary circumstances. Thus, as we emphasized in the Notice, a licensee who fails to make payment within 180 days sufficient to pay the late fees, interest, and principal, will be deemed to have failed to make full payment on its obligation and will be subject to license cancellation pursuant to Section 1.2104(g)(2) of the Commission's rules.

108. Several commenters support our efforts to provide licensees with predetermined non-delinquency periods without

requiring the submission of a formal grace period request.[291] In addition, many of the commenters addressing this issue, including AMTA, Hughes, AirTouch, Mountain Solutions and CII support the imposition of a late payment fee similar to that imposed in the broadband F block auction, in order to create a significant incentive for timely payment of installment obligations.[292] CII believes that modifying our current grace period procedures will provide licensees with knowledge in advance of the extent of any relief that will be forthcoming from the Commission to a licensee who misses an installment payment.[293] AirTouch believes that any licensee who fails to make payment within 180 days should face the automatic cancellation of its license. AirTouch contends that once a certain number of installment payments have been submitted late, the Commission should declare the licensee in default and subject to the default payments proposed in the Notice.[294] In contrast, only CIRI opposes this liberalization of the current grace period rules, requesting instead that grace period relief be made available only when a licensee can demonstrate that such relief is warranted and the public debt will ultimately be satisfied.[295] Although Hughes recommends the imposition of a "significant" late fee to the extent that an applicant misses a payment deadline, Hughes believes that a five to ten percent late fee is large enough to discourage late payments and to

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[291] See AMTA Comments at 12-13; CII Comments at 16; Pocket Comments at 7-8; Airtouch Comments at 8; Merlin Reply Comments at 4; Airadigm Reply Comments at 2; ISTA Reply Comments at 5-6.

[292] See AMTA Comments at 13; Hughes Comments at 8; AirTouch Comments at 8; Mountain Solutions Comments at 3, CII Comments at 16.

[293] CII Comments at 16.

[294] AirTouch Comments at 8-9.

[295] CIRI Comments at 14 and Reply Comments at 2-3.

ensure that the government is compensated for its administrative expenses in recouping the payment.[296] As an alternative to our proposal in the Notice, GWI proposes that any such late payment fee should be pro-rated over the 90 day payment period instead of accruing all at once regardless of when the late payment is made, in order to provide an economic incentive for licensees who are overdue in their payment obligations to retire the payment quickly instead of waiting until the end of the payment period. In addition, GWI suggests that such a pro-rated payment is fairer to licensees who inadvertently miss a required payment through administrative error or other unavoidable, unforeseen circumstances.[297]

109. As an alternative to our proposals in the Notice, Airadigm contends that following the first 90-day non-delinquency period, licensees should be given a second 90-day period with a five percent late fee, followed by a third 90-day grace period with a 10 percent late fee.[298] ISTA believes that a rule whereby any license is cancelled at the close of the second 90-day grace period is draconian, and that such a "hard-and-fast" automatic cancellation rule would doom many small businesses.[299] GWI opposes the imposition of an additional 10 percent late payment fee where licensees require an additional 90-day late payment period.[300] We decline to adopt these alternate proposals. As we indicated in the Notice, the grant of a grace period is an extraordinary remedy and we wish to encourage licensees to seek private market solutions to their

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[296] *Id.*

[297] GWI Reply Comments at 8.

[298] Airadigm Reply Comments at 2.

[299] ISTA Reply Comments at 7.

[300] GWI Reply Comments at 9.

capital problems before the payment due date. In this regard, we note that the Commission has an obligation under the Debt Collection Improvement Act ("DCIA") to enforce payment obligations owed to the federal government.[301]

110. We believe that the automatic grace period provisions we adopt today provide licensees with adequate financial incentives to make installment payments on time, while at the same time creating increased certainty that will help licensees pursue private market solutions to their financing difficulties. These provisions also will discourage licensees from attempting to maximize their cash flow at the government's expense by submitting a required installment payment after it is due. Several commenters agree with this assessment.[302] At the same time, these provisions will eliminate uncertainty for many licensees who are seeking to restructure other debt contingent upon the results of the Commission's installment payment provisions. In addition, this system will ease the burden on the Commission of considering individual grace period requests where Commission or its designee may not have the necessary resources to evaluate a licensee's financial condition, business plans, and capital structure proposals. We recognize that some commenters oppose the imposition of a late fee on overdue installment payment,[303] and in particular on the 90-day non-

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[301] *See* Debt Collection Improvement Act, Pub. L. No. 104-134, § 3100(j)(1), 110 Stat. 1321 (1996), codified at 31 U.S.C. § 3711(a).

[302] *See, e.g.*, AMTA Comments at 13; Hughes Comments at 8; AirTouch Comments at 8.

[303] ISTA Comments at 1 and Reply Comments at 4-5; IVDS Enterprises Reply Comments at 3; Pocket Comments at 7-8; Merlin Reply Comments at 4.

delinquency period.[304] However, this approach is consistent with the standard commercial practice of establishing late payment fees and developing financial incentives for licensees to resolve capital issues before payment due dates.[305] This approach also is consistent with the provisions of the DCIA, which requires that the Commission notify the Secretary of the Treasury and commence debt collection procedures where a party is more than 180 days past due on any outstanding debt owed to a federal agency.[306]

111. We recognize that a number of commenters oppose the application of these provisions to current licensees.[307] In particular, GWI and IVDS Enterprises argue that to the extent the Commission adopts a late payment fee, it should limit the imposition of such a fee to licenses issued in future auctions.[308] However, our recent experience with the installment payment program has shown the importance of ensuring that all licensees, including current licensees, have adequate financial incentives to make installment payments on time. We also note that in awarding licenses in the past to entities choosing to pay in installments, the Commission has emphasized that the terms of the installment payment program will be governed by current Commission rules and regulations, as amended. For example, in awarding licenses to C block licensees paying for their

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[304] Airadigm Comments at 14; IVDS Enterprises Reply Comments at 1-2.

[305] *See, e.g.*, Eldon H. Reiley, Guidebook to Security Interests in Personal Property, at § 4.02(iii) (1989).

[306] *See* 31 C.F.R.§ 3711(g)(1).

[307] *See* Mountain Solutions Reply Comments at 5-6; GWI Reply Comments at 7; IVDS Enterprises Reply Comments at 4.

[308] GWI Reply Comments at 7; IVDS Enterprises Reply Comments at 4.

licenses in installments, the Commission indicated in the associated "Note and Security Agreement" that the terms of the installment plan would be governed by and construed in accordance with then-applicable Commission orders and regulations, as amended. We also believe that these licensees should obtain the benefit of increased certainty that provisions for automatic grace periods provide. This decision is supported by Mountain Solutions, who requests that current licensees obtain the benefits of any loosening of the late payment fee and grace period rules.[309]

112. As provided in the *Second Report and Order* and Further Notice of Proposed Rule Making, installment payments for C and F block licensees will resume effective March 31, 1998. Under our decision to reinstate installment payments for these licensees, we provided them with one automatic 60-day non- delinquency period following the March 31, 1998, deadline, during which time they will not be considered delinquent in their payment obligations. As we indicated in the *Second Report and Order* and Further Notice of Proposed Rule Making, we will not entertain any requests for extension of the March 31, 1998 deadline beyond an automatic 60-day non-delinquency period, so that for C and F block licensees all required payments must be submitted no later than May 30, 1998. Only those licensees making a timely payment of all amounts due, as set forth in the *Second Report and Order* will be permitted to take advantage of the late payment provisions we adopt today.[310]

113. In commenting on these modifications to the grace period provisions, CIRI also proposes that the Commission

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[309] Mountain Solutions Reply Comments at 5-6.

[310] *See* 47 C.F.R. § 1,2110.

make public the terms of any workouts or debt relief provided to licensees.[311] CIRI notes that parties may request confidential treatment of sensitive financial information pursuant to Section 0.459 of the Commission's rules, and that such confidential treatment should be sufficient to safeguard the privacy interests of licensees, while still making the terms of any workout available for public scrutiny.[312] As an initial matter, because we adopt our proposals providing for automatic grace periods, we do not envision licensees filing grace period requests under normal circumstances from this point forward. As a result, we believe that CIRI's concerns about the Commission making public a licensee's request for grace period relief are moot. Moreover, because from this point forward a licensee's taking advantage of our late payment provisions will be an administrative matter processed by the Commission's loan servicer, and not a formal waiver request, aside from instances where a licensee is declared in default, there will be no public notice of a licensee's payment status. The license is cancelled automatically under such circumstances. In contrast, for licensees who have previously filed grace period requests consistent with our current rules and procedures, we will continue our current practice of making the request public when a decision is released granting or denying the request, except to the extent that any request by the licensee for confidential treatment is granted pursuant to Section 0.459 of the Commission's rules.[313] We further clarify that such licensees

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[311] CIRI Reply Comments at 3.

[312] *Id.* at 4.

[313] *See* 47 C.F.R.§ 0.459. We note that several PCS C and F block licensees have filed requests for an extension of the deadline for making payments with the Bureau pursuant to 47 C.F.R.§ 1.2110(e)(4)(ii). In addition, two parties have filed requests for the restructuring of installment payment schedules, and several parties have filed requests for annual, as opposed to quarterly payment schedules. These requests will be addressed separately by the Bureau in a manner consistent with the procedures we have outlined.

are not deemed to be in default on these licenses until such time as the Bureau issues a decision on these grace period requests. Licensees whose requests for a grace period are denied will have ten (10) business days to make the required payment or be considered in default.

b. Defaults on Installment Payments

114. *Background.* In the Notice, we tentatively concluded that licensees that default on installment payment obligations should be subject to the default payment provisions outlined in Section 1.2104(g) (i.e., the difference between the defaulting winner's bid and the subsequent winning bid plus 3 percent of the lesser of these amounts). Sections 1.2110(e)(1) and 1.2110(e)(2) of our rules provide that applicants eligible for installment payments will be liable for such a payment if they fail to remit either their initial or final down payment.[314] Section 1.2110(e)(4)(iii) provides that (1) following the expiration of any grace period without successful resumption of payment, (2) upon denial of a grace period request, or (3) upon default with no such request submitted, the license of an entity paying on an installment basis will be cancelled automatically and the Commission will initiate debt collection procedures pursuant to Federal Claims Collection Standards and applicable laws.[315] This section of our rules does not clearly indicate, however, whether under these circumstances the licensee will be liable for the default payment set forth in Section 1.2104(g).

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[314] 47 C.F.R. §§ 1.1220(e)(i) and 1.2110(e)(2).

[315] 47 C.F.R.§ 1.2110(e)(4)(iii); *see* 47 C.F.R. Part I, Subpart O, 4 C.F.R. Parts 101-105, and 31 U.§.C.§§ 3701 et seq.

115. *Discussion.* We do not adopt our tentative conclusion to apply the default provisions of Section 1.2104(g) to licensees who default on an installment payment. Most commenters addressing the issue oppose this proposal.[316] For example, Pocket submits that default payments assessed later in the license term become highly arbitrary and unduly burdensome. Pocket also contends that such payments are greater than those traditionally required for secured creditors and create substantial disincentives for investors and creditors who might otherwise be interested in providing financing for licensees.[317] Pocket also notes that any default payment assessed disadvantages a licensee's other creditors, which also makes it more difficult for licensees to raise capital.[318] Finally, Pocket states that default payments assessed later in the license term have no deterrent effect as there is no basis to believe that licensees that have paid substantial sums to the Treasury will willingly default.[319] In contrast, AirTouch supports our tentative conclusion that licensees that ultimately fail to fulfill their installment payment obligations despite the availability of a 90-day non- delinquency period and a subsequent, automatic 90-day grace period, should be declared in default, and in turn be made subject to the default payments proposed in the Notice.[320]

116. We have considered the comments of those who oppose the proposed assessment, and find that an additional

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[316] *See, e.g.*, Airadigm Comments at 16; Pocket Comments at 9.

[317] Pocket Comments at 9.

[318] *Id.*

[319] Pocket Comments at 10.

[320] AirTouch Comments at 8-9.

payment requirement for licensees defaulting on installments is not necessary to achieve our stated objectives. Our current rules and installment payment terms are adequate to discourage defaults and encourage licensees to find private market solutions when they face financial difficulties. We also believe that the rules we adopt today providing for a 90-day non-delinquency period followed by a subsequent, automatic 90-day grace period, subject to appropriate late fees of five percent for the 90-day non-delinquency period and 10% for automatic 90-day grace period, payable at the conclusion of these periods serve these goals without substantially risking delays or disruption in service to the public. In particular, we believe that this certainty regarding the Commission's treatment of licensees needing extra time to make their installment payments will increase the likelihood that licensees and potential investors will find solutions to capital problems before a default occurs. The risk of losing its license should provide a licensee a strong incentive to avoid default. If, however, a default does occur, the conditions on the face of each license and the terms of the notes and security agreements executed by licensees provide the Commission appropriate remedies that will ensure that defaulted licenses are returned to the Commission for reauction and that all outstanding debts, as well as the Commission's costs, are recoverable.

c. Cross Default in the Context of Installment Payments

117. *Background.* As we indicated in the Notice, a number of parties have asked that we address the issue of cross default in the context of installment payments.[321] The

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[321] *See, e.g.*, Letter to Michele C. Farquhar from Jay P. Urwitz, August 2, 1996.

Commission's rules currently provide that in the event of default, any default payment assessed will be deducted from any upfront payments or down payments a defaulting bidder has deposited with the Commission.[322] The Commission has pursued a policy of cross default for defaults on down payments.[323] A cross default provision would specify that if a licensee defaults on one installment payment loan, it would also default on any other installment payment loans it holds. These provisions are standard in credit-related agreements.[324] We sought comment on whether the Commission should apply cross defaults to its installment payment plan loans. We also asked whether to apply a cross default provision across services. We asked, for example, whether the Commission should consider pursuing default remedies against all PCS and SMR licenses when a licensee with both SMR and broadband PCS licenses defaults on one of its PCS licenses. Alternatively, we asked whether we should pursue default remedies against the single license only. We also asked whether specific factors should influence our decision to pursue cross-defaults and whether cross defaults should be applied automatically or on a case-by-case basis. Finally, we sought comment in general on what remedies are appropriate when licensees default on installment payments.

118. In response to the Installment Payment Public Notice,

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[322] 47 C.F.R.§ 1.2104(g)(2).

[323] *See* "Wireless Telecommunications Bureau Will Strictly Enforce Default Payment Rules," Public Notice, 11 FCC Rcd 10853 (1996). *See also* Letter to Kenneth Hobbs from Michele C. Farquhar, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, DA 97-260 (rel. February 4, 1997)

[324] *See* Stephen R. Kruft, Cross Default Provisions in Financing and Derivatives Transactions, 113.Banking L.J. 216 (1996).

the Commission received extensive comment on the issue of cross default in the context of defaults on installment payments. Several commenters urged the Commission not to adopt a cross default provision.[325] In addition, some commenters urged the Commission to allow licensees to distribute their licenses among independent entities as a means of insulating against cross default.[326] Such a decision, they contend, would allow potential financiers to invest in specific markets that meet their investment criteria without fear that a default in other markets would threaten their investment.[327] Furthermore, some commenters specifically requested that the Commission clarify its rules regarding cross default in the context of defaults on installment payments if licenses are held by licensees with the same or overlapping control groups.[328]

119. In the *Second Report and Order* in this docket, we concluded that we would not pursue cross default remedies against C block licensees who default on installment payments with regard to other licenses in the C or F blocks.[329] We stated that our decision was warranted in light of our efforts to

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[325] *See e.g.*, BIA Capital Comments at 4; AmeriCall ex parte letter, July 11, 1997; Magnacom ex parte letter, August 13, 1997.

[326] *See, e.g.*, ClearComm Reply Comments at 4.

[327] *Id.*

[328] *See, e.g.*, ClearComm Reply Comments at 4; BIA Capital Comments at 4.

[329] *See* Second Report and Order at pp 79-80. We explained, for example, that if a licensee defaults on a C block license and that licensee holds other C block licenses on which it is making its payments, we will not declare it to be in default on its debt associated with the other C block licenses. Similarly, if a licensee defaults on a C block license, and also holds F block licenses on which it is making its payments, we will not declare it to be in default on its F block debt.

provide current C block licensees who are experiencing financing difficulties with options for meeting their financial obligations to the Commission. We deferred until completion of the Part 1 Rule Making our decision on whether to amend more comprehensively our policy of cross defaults. We also emphasized that existing installment payment default rules and license conditions would continue to apply for any C block licensees found to be in default after the March 31, 1998, date for resumption of C block installment payments.

120. *Discussion.* After consideration of the comments in the proceeding, we conclude that we will not pursue a policy of cross default (either within or across services) where licensees default on an installment payment. Because we eliminate the use of installment payments as a means of financing small business participation in our auction program for the foreseeable future (see Section III.B.5, *supra*), we note that in practice this decision will apply only to existing licensees who are currently paying for their licenses in installments.

121. Our decision not to pursue cross default remedies against current licensees who default on an installment payment is supported by the majority of commenters.[330] For example, Airadigm contends that it is unfair to jeopardize an entire business because of a default on one license.[331] Similarly, ISTA argues for separate treatment of separate services, regardless of ownership, lest a failure in one business cause failure in unrelated businesses.[332] IVDS Enterprises proposes that

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[330] *See, e.g.*, Airadigm Comments at 16; Reply Comments at 5; Pocket Comments at 11, Merlin Reply Comments at 6-7; NPCS Reply Comments at 8; ISTA Reply Comments at 8; GWI Reply Comments at 4.

[331] Airadigm Comments at 16.

[332] ISTA Reply Comments at 8.

licensees be able to discontinue installment payments on a particular license and allow that license to be cancelled or revoked.[333] IVDS Enterprises believes that such a decision should not affect the licensee's other licenses, whether in the same or other services, where the licensee has made timely installment payments.[334] Alternatively, Pocket believes that the Commission should reserve the authority to impose cross defaults on a case-by-case basis only for licensees that have demonstrated bad faith.[335]

122. We recognize that some commenters strongly advocate a policy of cross defaults in this context. These commenters suggest that such a policy (1) prevents speculation during the auction and cherry-picking (e.g., selectively defaulting on some licenses while keeping others) after the auction concludes,[336] (2) encourages auction participants to find private market solutions to financial shortfalls,[337] and (3) is consistent with commercial lending policies.[338] We believe, however, that the default provisions contained in Section 1.2104(g)(2) serve as an adequate incentive to discourage speculation and encourage licensees to pursue non-default solutions to financial difficulties. We also emphasize that our decision on this matter only addresses default in the context of installment payments, and does not affect our policy with

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[333] IVDS Enterprises Reply Comments at 4.

[334] IVDS Enterprises Reply Comments at 4-5.

[335] Pocket Comments at 12-13.

[336] CIRI Comments at 15-16.

[337] PCIA Comments at 7, AirTouch Comments at 9.

[338] Airtouch Comments at 9.

regard to defaults on down payments.[339] In addition, by making licensees who default on an installment payment subject to the default payment set forth in Section 1.2104(g)(2), we create an additional deterrent to licensees considering default as a solution to financing shortfalls. We believe that this policy will promote the goals of Section 309(j) by not punishing otherwise successful licensees for failures in one market, and will strike an appropriate balance between our conflicting roles as both "lender" and "regulator."[340] Accordingly, upon default on an installment payment, a license will automatically cancel without further action by the Commission, the licensee will become subject to the default payment set forth in Section 1.2104(g) of our rules (see Section III.D.5, *supra*), and the Commission will initiate debt collection procedures against the licensee and accountable affiliates.[341]

E. Competitive Bidding Design, Procedure, and Timing Issues

1. Balanced Budget Act of 1997 Notice and Comment Procedures

123. *Background*. The Balanced Budget Act of 1997 provides that "before the issuance of bidding rules" the Commission must provide adequate time for parties to comment on proposed auction procedures, and that "after the issuance of bidding rules," the Commission must provide

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[339] *See* Section III.D.b, *supra*. *See also* BDPCS, Inc. Emergency Petition for Waiver of Section 24.711(a)(2) of the Commission's Rules, Memorandum Opinion and Order, 12 FCC Rcd 3230 (1997).

[340] *See Report to Congress* at 39.

[341] 47 C.F.R.§§ 1.2104(g), 1.2110(e)(4)(iii). *See also* 31 U.S.C. Chapter 37; 4 C.F.R. Parts 101-105; 47 C.F.R. Part 1, Subpart O.

adequate time "to ensure that interested parties have sufficient time to develop business plans, assess market conditions, and evaluate availability of equipment."[342] In previous auctions, it has been our practice to permit the Bureau, on delegated authority, to address a variety of issues related to the conduct of the auction and to announce these issues by public notice subsequent to the adoption of service-specific auction rules.[343]] This practice has proven workable and efficient, and has enabled the Commission, through the involvement of the Bureau, to respond rapidly to a variety of day-to-day operational concerns associated with the conduct of each auction.

124. *Discussion*. We believe that in the past our service-specific rule making process has served the purpose of adequately ensuring that interested parties have sufficient time to familiarize themselves with the rules and procedures to be employed in an auction prior to the application deadlines and start date of that auction. We nevertheless believe that this legislation requires that we provide an additional opportunity for input from potential bidders prior to the issuance of detailed auction-specific information by the Bureau. To date, the Bureau has served as the primary point of contact with potential bidders and other parties interested in issues relating to each

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[342] Balanced Budget Act of 1997,§ 3002(a)(1)(B)(iv)

[343] *See, e.g.*, "Auction of 800 MHz Specialized Mobile Radio Service Licenses," Public Notice, DA 97-1672 (rel. August 6, 1997) ("800 MHZ SMR Pre- Auction Public Notice); "Auction of Local Multipoint Distribution Service Licenses," Public Notice, DA 97-2081(rel. September 25, 1997) ("LMDS Pre- Auction Public Notice").

upcoming auction, and this has worked well.[344] In light of the typically time-sensitive nature of most issues arising in the weeks prior to the start of an auction, the Bureau has been equipped to make determinations and respond rapidly to potential bidders' concerns.[345] Consistent with the provisions of the Balanced Budget Act, and to ensure that potential bidders have adequate time to familiarize themselves with the specific provisions that will govern the day-to-day conduct of an auction, we direct the Bureau, under its existing delegated authority,[346] to seek comment on a variety of auction-specific issues prior to the start of each auction.[347]

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[344] For example, the Bureau has traditionally released a public notice announcing the licenses to be auctioned, the start date of the auction, relevant filing deadlines (*e.g.*, the short-form application (FCC Form 175) filing deadline and the deadline for submission of upfront payments) and dates for pre-auction events (*e.g.*, the auction seminar and mock auction). *See, e.g.*, "FCC Announces Upcoming Spectrum Auction Schedule; Two Auctions To Commence Before End of the Year," Public Notice, DA 97-1627 (rel. July 30, 1997).

[345] *See, e.g.*, Letter to Mr. John Prawat, DigiVox Telecom, Inc. from Kathleen O'Brien Ham, Chief, Auctions Division, Wireless Telecommunications Bureau, Federal Communications Commission, DA 97-730 (rel. April 11, 1997) (addressing DigiVox's Request for Rule Waiver of the Upfront Payment Requirement in the WCS Auction); Letter to Linda Feldmann, Esq., Leventhal, Senter & Lerman, from Kathleen O'Brien Ham, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, DA 97-2261 (rel. October 24, 1997) (addressing the request of Castle Tower Corporation (PR) for waiver of the Commission's Rules to correct its application to reflect its status as non-small business applicant in the 800 MHz SMR auction).

[346] *See* 47 C.F.R.§§ 0.131(c), 0.331, 0.332.

[347] We note that the Bureau has recently begun this process by seeking comment on issues relating to the 800 MHz and LMDS auctions, both of which we announced prior to the passage of the Balanced Budget Act. *See* "Comment Sought on Balanced Budget Provisions Calling For Reserve Prices or Minimum Opening Bids in FCC Auctions," Public Notice, DA 97-1933 (rel. September 5, 1997) (800 MHz SMR), and "Comment Sought on Reserve Prices or Minimum Opening Bids for LMDS Auction," Public Notice, DA 97-2224 (rel. October 17, 1997) (LMDS).

125. We direct the Bureau to seek comment on specific mechanisms relating to day-to-day auction conduct including, for example, the structure of bidding rounds and stages, establishment of minimum opening bids or reserve prices,[348] minimum acceptable bids, initial maximum eligibility for each bidder, activity requirements for each stage of the auction, activity rule waivers, criteria for determining reductions in eligibility, information regarding bid withdrawal and bid removal, stopping rules, and information relating to auction delay, suspension, or cancellation. We direct the Bureau to afford interested parties a reasonable time, in light of the start date of each auction and relevant pre-auction filing deadlines, to comment on auction-specific issues. In this regard, we note that it has been the Bureau's practice to release the public notice providing details concerning each upcoming auction sufficiently in advance of the short-form filing deadline (e.g., 30 days prior to the deadline) to provide interested parties with an opportunity to develop business plans, assess market conditions and evaluate the availability of equipment. Also consistent with our previous practice, we recognize that the Bureau needs the flexibility to announce, at any time in the weeks leading up to the start date of each auction, any minor, non-substantive amendments or clarifications to the specific mechanisms set forth in auction-related public notices or the Bidder Information Package. We believe that this process is consistent with the requirements of Section 3002(a)(1)(B)(iv) of the Balanced Budget Act, and will afford potential bidders

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[348] *See* Section III.E.4, *infra*.

adequate notice, as well as an opportunity to comment on the Bureau's intentions regarding issues relating to the day-to-day conduct of each auction.

2. "Real time" Bidding

126. *Background.* Congress has directed the Commission to "design and test multiple alternative methodologies for auction designs."[349] In the Order accompanying the Notice, we amended our general auction rules to specify a menu from which the Commission may choose an auction design.[350] These designs include: (1) simultaneous multiple-round auctions, using remote and/or on-site electronic bidding; (2) sequential multiple-round auctions, using either oral ascending or remote and/or on-site electronic bidding; and (3) sequential or simultaneous single-round auctions, using either remote or on-site electronic bidding, or sealed bids. The simultaneous multiple-round auction methodology with discrete rounds has been used in most auctions thus far because it provides bidders with information regarding the value others place on licenses and allows bidders to pursue backup strategies as more information becomes available during the auction.

127. As we indicated in the Notice, the Commission is always interested in exploring new ways to reduce the length of each auction without sacrificing the economic efficiency of the competitive bidding process.[351] We sought comment on how we could speed our auctions, and in particular, our simultaneous multiple-round auctions. For example, we sought

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[349] 47 U.S.C.§ 309(j)(3).

[350] *See* Competitive Bidding Second Report and Order, 9 FCC Rcd at 2373- 2374, pp 146-153.

[351] *Notice* at p 79.

comment on how we could modify our current procedural rules for simultaneous multiple-round auctions to meet this objective, or what new designs we might use to efficiently allocate numerous licenses.[352] Among other options, we proposed to modify our current simultaneous multiple-round auction rules to allow for "real time" bidding -- a system in which bidding occurs on an open and continuous basis within each bidding period -- as another design feature for electronic multiple-round auctions.[353] This is in contrast to the current discrete bidding periods currently used in the simultaneous multiple round auction where bidders cannot see or react to the bids of other bidders until the close of each bidding period. In addition, we sought comment on the appropriate length for the real time bidding rounds and on what measures we can take to assure bidders that they will have enough time to determine their bidding strategies with "real time" bidding. Finally, we sought comment on the impact of "real time" bidding on small businesses, generally, and in particular on their ability to process bid information during the course of a single round.

128. *Discussion.* We adopt our proposal in the Notice to allow for "real time" bidding as an alternate design methodology in our rules. After careful consideration of the comments received in this proceeding, as well as our experience in conducting 15 auctions to date, we conclude that "real time" bidding will allow auctions to proceed more rapidly because it will allow bidders immediate feedback on new high bids. We also note that in an effort to simplify the auction process and prevent "gaming" of bids, the Commission has recently modified its electronic bidding process by

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[352] *Id.* at ¶ 80.

[353] *Id.* at ¶¶ 81-84.

implementing "click-box bidding."[354] This feature, which replaces the field where bidders previously typed their dollar bid amount with a "click on check box to bid" field (where the only bid amount allowed is at the minimum acceptable bid) no longer allows bidders to type a bid amount on the Bid Submission screen. As such, "click-box bidding" can work well in a "real-time" bidding context because bidders can more rapidly respond to the bids of other bidders, permitting an auction to progress more rapidly and efficiently. The Commission has successfully employed click box bidding in the recently completed 800 MHz SMR auction,[355] and plans to employ it in the forthcoming LMDS auction.[356]

129. The Commission delegates to the Bureau the authority to determine whether the public interest will be served by "real time" bidding in a particular auction. Most commenters oppose the use of "real time" bidding, arguing it may be difficult for bidders to react quickly enough to ensure that in each bidding round they make new high bids on the necessary percentage of their bidding eligibility to meet their activity requirement.[357] These commenters also believe that the

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[354] *See, e.g.*, Applications of Mercury PCS II, LLC For Facilities in the Broadband Personal Communications Systems in the D, E and F Blocks, Notice of Apparent Liability for Forfeiture, FCC 97-388 (rel. October 28, 1997) ("Mercury NALF").

[355] *See* "FCC Announces Changes to Auction Procedures for the 800 MHz SMR Auction (Auction No. 16)," Public Notice, DA 97-1934 (rel. September 5, 1997).

[356] *See* LMDS Pre-Auction Public Notice.

[357] *See* Nextel Comments at 3-4 and Reply Comments at 5-6; AT&T Comments at 5; ACE Comments at 16; AMTA Comments at 13-14; NPCS Reply Comments at 8-9; CellNet Reply Comments at 6; NextWave Reply Comments at 7. *See* Competitive Bidding Second Report and Order, 9 FCC Rcd 2371, pp 133-37 (1994), for an explanation and description of the

somewhat accelerated pace of "real time" bidding may leave less time to craft informed bidding strategies during the auction.[358]

130. As mentioned above, the "click-box bidding" format should significantly improve a bidder's ability to reach quickly. Further, should we determine to employ "real-time" bidding in the future, we believe that the issues involving meeting activity requirements will be alleviated by our proposal in the Notice to open a discrete closed bidding period after each fixed period of "real time" bidding (when only standing high bids from the previous round and new high bids from the current round count in determining the bidder's activity level). During this closed bidding period, bidders will be able to submit valid bids (bids that meet or exceed the minimum accepted bid) to ensure that they have the opportunity to meet their activity requirements for the round. Following the discrete closed bidding period, the Commission will post the final round results for the period and make all bids available to the public. This discrete period should help to eliminate any risks of not meeting eligibility requirements or having time to formulate bidding strategies which commenters suggest may be associated with "real time" electronic bidding.[359] In particular, this period will help to provide bidders sufficient time to meet eligibility requirements

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Commission's activity rules.

[358] *See* Nextel Comments at 3-4 and Reply Comments at 5-6; AT&T Comments at 5; ACE Comments at 16; AMTA Comments at 13-14; NPCS Reply Comments at 8-9; CellNet Reply Comments at 6; NextWave Reply Comments at 7.

[359] *See* Nextel Comments at 3-4 and Reply Comments at 5-6; AT&T Comments at 5; ACE Comments at 16; AMTA Comments at 13-15; NextWave Reply Comments at 6-7; NPCS Reply Comments at 8-9; CellNet Reply Comments at 6.

and will minimize the risks, suggested by some commenters, of the submission of erroneous bids.[360]

131. One of the greatest advantages to "real time" bidding is that allows bidders to obtain immediate feedback on new high bids, withdrawn high bids and minimum accepted bids, and thereby provides them with the opportunity to immediately respond to this information and move licenses toward their final valuations more quickly. We believe that, particularly in the case of complex auctions of multiple licenses, it is one means of helping auctions to progress more efficiently. Under the current simultaneous multiple-round auction rules, each round of bidding contains a discrete bidding period during which bidders cannot see the actions of other bidders. Bidders must wait until the end of each round to see the bids placed by other bidders and determine their status as high bidder. In contrast, an open, continuous bidding round -- in which bidders know when their bid has been exceeded and are free to bid again -- can be used to reduce the delay inherent in the current design where a bidder must wait until the next discrete round to react to the actions of other bidders.

132. We note that some commenters express concern that the widespread use of "real time" bidding would increase the administrative costs of participating in the auction due to the incentive to stay on-line during the continuous bidding period and thereby work to exclude smaller entities that may lack the resources to devote to a concentrated bidding period or to stay on-line during the entire bidding period.[361] We agree with

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[360] *See* Nextel Comments at 3; CII Comments at 17; NextWave Reply Comments at 7.

[361] Nextel Comments at 3; AMTA Comments at 13-14; NextWave Reply Comments at 6-7; CellNet Reply Comments at 6.

commenters that under some circumstances the costs of participating in an auction in which bidders are required to be "on-line" may discourage the participation of small businesses. We therefore conclude that the per minute charge for bidding "on- line" should be reexamined, and delegate to the Bureau that authority to implement such a reduced fee in the future, if appropriate.[362]

133. No commenters addressed our tentative conclusion in that Notice that because "real time" auctions are a variation of the simultaneous multiple-round auction design established in our rules, many of the same procedures (i.e., upfront payments to determine eligibility, activity requirements that apply to each round, minimum bid increments, and a stopping rule) should apply.[363] These procedures have proven workable and easily understood by bidders in the context of our simultaneous multiple-round auction design, but some modifications to these procedures may be necessary if we employ "real time" bidding. We conclude that the Bureau should undertake this task.

134. Consistent with the Balanced Budget Act,[364] we direct the Bureau (see Section III.E.1, *supra*) to seek comment from

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[362] The Commission adopted a fee schedule for obtaining access to the Commission's database and remote bidding software packages. The remote bidding software package is available for $175. The current charge for on-line remote access via a 900 number is $2.30 per minute. *See* Assessment and Collection of Charges for FCC Proprietary Remote Software Packages, On-Line Communications Services Charges, and Bidders Information Packages in Connection with Auctionable Services, WT Docket No. 95-69, Report and Order, FCC 95-308 (rel. July 21, 1995).

[363] Competitive Bidding Second Report and Order, 9 FCC Rcd at 2367-68, pp 116-21 (1994). *See also* Competitive Bidding Fifth Report and Order, 9 FCC Rcd 5532, pp 24-26.

[364] *See* Balanced Budget Act, § 3002.

the public on auction- specific issues (i.e., duration of bidding rounds and activity requirements) prior to the start of each auction. We believe that this practice of seeking comment on such issues prior to the start of each auction will adequately address any additional concerns associated with the use of "real time" bidding. We also note that we seek, on an ongoing basis, to enhance and improve our bidding processes. We believe that the Bureau should explore "real time" bidding consistent with the requirement under Section 309(j) that we experiment with different bidding methodologies.[365]

3. Combinatorial Bidding

135. *Background*. Combinatorial bidding, also known as package bidding, allows bidders to place single bids for groups of licenses. For example, in a combinatorial auction, bidder A could place a bid of $100,000 for licenses 1, 2 and 4, while bidder B places a bid of $500,000 for licenses 2, 3 and 5. The bidding software then calculates the revenue maximizing solution and awards the high bids for that round to the appropriate package(s). Three commenters discussed the possible use of combinatorial bidding as a method of speeding the auction process by providing for the efficient aggregation of licenses. Specifically, the Automated Credit Exchange ("ACE") strongly supports the use of combinatorial bidding, stating that such a system can increase the speed of particular auctions and provide for the deployment of spectrum resources in the most efficient license configurations.[366] In contrast, Merlin argues that combinatorial bidding is too complex and difficult to implement, and suggests that such a system would disadvantage smaller entities interested in bidding for smaller

[365] *See*47 U.S.C. § 309(j)(3).

[366] ACE Comments at 1-15.

areas or niche markets.[367] Finally, AirTouch contends that combinatorial bidding should not be used in auctions of encumbered spectrum because incumbents do not undertake the same system/license acquisition planning strategy as bidders in auctions for unencumbered spectrum.[368]

136. *Discussion*. We did not specifically seek comment in the Notice on the use of combinatorial bidding as an auction design methodology. Our current Part 1 rules already provide for the use of combinatorial bidding as one of our competitive bidding design options.[369] In addition, the Commission was directed by Congress in the Balanced Budget Act of 1997 to consider the use of combinatorial bidding as an alternative auction design that could be used, in certain instances, as a means of speeding the auction process.[370] Specifically, the Balanced Budget Act requires the Commission, for testing purposes, to design and conduct an auction in which a system of combinatorial bidding is used.[371]

137. We have insufficient information to determine how this relatively new bidding methodology might be used to improve our spectrum auction program. The Commission will seek comment on a number of issues relating to combinatorial bidding, and will more thoroughly address this issue once the record is complete. The Commission has also awarded a research and development contract to a private sector consultant to examine theoretical and applied combinatorial bidding

[367] Merlin Reply Comments at 8.

[368] AirTouch Reply Comments at 8.

[369] See 47 C.F.R. § 1.2103(b).

[370] Balanced Budget Act.

[371] Balanced Budget Act; 47 U.S.C. § 309(j)(3)(i).

approaches where licenses exhibit strong synergies and bidders have overlapping preferences (i.e., prefer different packages of licenses). The contractor will also evaluate the most appropriate of the theoretical and applied approaches to combinatorial bidding for spectrum auctions and address a number of concerns raised by the Commission and other interested parties. Our goal in awarding the contract is to allow private sector and government auction experts to address these concerns and investigate the possible effects of the use of combinatorial bidding on the auction process, including the Commission's fulfillment of the objectives of Section 309(j) of the Communications Act.

4. Minimum Opening Bids and Reserve Prices

138. *Background*. Section 1.2104(d) of our rules states that the Commission may establish suggested minimum opening bids.[372] In the Notice, we proposed to amend Section 1.2104 to specify that the Commission may establish minimum opening bids, rather than suggested minimum opening bids.[373] Such a provision has been adopted in service-specific rules.[374] In the Notice, we indicated that a minimum opening bid can serve some of the same purposes as a reservation price by preventing a license from being awarded under circumstances where there would be little competition among bidders and significant incentives to collude.[375] In addition, we noted that establishing a minimum opening bid is one way of helping to

[372] 47 C.F.R. § 1.2104(d) (emphasis added).

[373] *Notice* at ¶ 86.

[374] *See, e.g.* 47 C.F.R. § 101.71 (DBS).

[375] *Notice* at ¶ 86. *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2384, ¶ 207.

speed the auction process, and thus the provision of service to the public.[376] After the release of the Notice, Congress passed the Balanced Budget Act of 1997, which directed the Commission to prescribe methods by which a reasonable reserve price will be required or a minimum opening bid will be established, unless the Commission determines that a reserve price or a minimum opening bid are not in the public interest.[377]

139. *Discussion*. Several commenters oppose the use of minimum opening bids.[378] However, the Balanced Budget Act establishes a presumption in favor of a required minimum opening bid or reserve price.[379] We therefore adopt our proposal in the Notice to delete the term "suggested" from Section 1.2104(d). We also clarify that the Bureau has the authority to seek comment on minimum opening bids and reserve prices and to establish such mechanisms for each auction, consistent with its role in managing the auction process and setting valuations for other purposes (e.g., setting upfront payment amounts). The Bureau shall establish a minimum opening bid and/or reserve price for each auction, unless, after comment is sought prior to a particular auction, it is determined that a minimum opening bid or reserve price would not be in

[376] *Id.*

[377] Balanced Budget Act; 47 U.S.C. § 309(j)(4)(F).

[378] *See* AirTouch Comments at 10; PageNet Comments at 12; Nextel Comments at 7 and Reply Comments at 6; CII Comments at 18; ISTA Comments at 3; Hughes Comments at 9-10; Airadigm Comments at 17; AMTA Comments at 15; CellNet Reply Comments at 7.

[379] Section 3002(a)(1)(C)(iii) of the Balanced Budget Act provides that the Commission must "prescribe methods by which a reasonable reserve price will be required, or a minimum opening bid will be established, to obtain any license or permit being assigned ... unless ... such a reserve price or minimum opening bid is not in the public interest." Balanced Budget Act,§ 3002(a)(1)(C)(iii).

the public interest.

140. The terms "minimum opening bid" and "reserve price" are traditionally different, and are employed for different purposes. A reserve price is defined as an absolute minimum price below which an auctioneer will not sell an object being auctioned. It may be disclosed to bidders before an auction or during an auction, or it may be kept secret, so that a "winning" bidder does not actually find out if the object has been won until after the auction has closed. Auctioneers generally employ reserve prices to order to maximize the revenue earned from an auction.[380] A minimum bid is a minimum value below which bids will not be accepted in the first round of an auction. The level of a minimum opening bid is not unchangeable like a reserve price, but may be reduced at the discretion of the auctioneer if no bids are made at the existing level. The primary purpose of a minimum opening bid is to speed up the course of an auction. However, a minimum bid also can serve a revenue-enhancing function like a reserve price, because if bids will not be accepted below a certain level, they will also not be sold below that level. That is, a minimum opening bid effectively functions as a reserve price unless or until it is reduced. Regarding the level of reserves or minimum bids, we do not believe that the Balanced Budget Act provision means that we should now be attempting to maximize the revenue earned in all future spectrum license auctions. The other auction goals in the Act, such as ensuring the deployment and rapid deployment of new technologies and services and

[380] Auction theory shows that the reserve price device accomplishes its revenue maximization goal because it gives all bidders an incentive to increase the level of their bids above what they would be in the absence of a reserve.

promoting economic opportunity and competition,[381] have not been eliminated, and we must continue to balance and pursue them all. Therefore, we conclude that the new provision does not call for traditional reserve prices. Rather, it calls for an added protection that licenses will not be assigned at unacceptably low prices.

141. We believe that the Bureau should have the discretion to employ either or both of these mechanisms for future auctions.[382] We direct the Bureau to seek comment on the use of a minimum opening bid and/or reserve price, as it will do for a variety of auction-specific issues,[383] prior to each auction. In addition, the Bureau should seek comment on the methodology to be employed in establishing each of these mechanisms. Among other factors, the Bureau should consider the amount of spectrum being auctioned, levels of incumbency, the availability of technology to provide service, the size of the geographic service areas, issues of interference with other spectrum bands, and any other relevant factors that could reasonably have an impact on valuation of the spectrum being auctioned.

5. Maximum Bid Increments

142. *Background.* A bid increment is the amount or percentage by which a bid must be raised above the high bid of the previous round in order to be accepted as a valid bid in the

[381] *See* 47 U.S.C. s 309(j)(3).

[382] We note that our Part I rules already provide that the Commission may provide for a suggested minimum opening bid and may establish a reservation price, either disclosed or undisclosed, below which a license subject to auction will not be awarded. *See* 47 C.F.R.§§ 1.2104(c), (d).

[383] *See* Section II, *supra*.

current round. In the *Competitive Bidding Second Report and Order*, we determined that the Commission would reserve the right to specify minimum bid increments in dollar terms as well as in percentage terms.[384] We reasoned that imposing a minimum bid increment speeds the progress of the auction and, in combination with activity and stopping rules, helps to ensure that the auction comes to a close within a reasonable period of time.[385] We did not reserve the discretion to specify maximum bid increments. In the Notice, we therefore sought comment on whether the Commission should retain the discretion to employ a maximum bid increment if it finds that jump bidding (i.e., placing bids that are significantly higher than the minimum acceptable bid) is impairing the auction process.[386]

143. *Discussion*. Several commenters suggest that jump bidding is not a problem of serious concern.[387] Some theoretical literature, however, suggests that bidders could use jump bidding to manipulate the auction process and potentially reduce efficiency of the auction.[388] For example, a general principle of auction theory is that the auction mechanisms that perform the best are those which are able to induce bidders to reveal the most information. To the extent that jump bids

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[384]Competitive Bidding Second Report and Order, 9 FCC Rcd at 2369, pp 124-26.

[385]*Id.*

[386] Notice at p 88.

[387]*See* AirTouch Comments at 11, Reply Comments at 5; PageNet Comments at 12-13; NextWave Reply Comments at 8.

[388] *See* Lawrence M. Ausubel, "Open-Outcry Auctions for FCC Licenses," Comments for MCI Telecommunications Corp in IB Docket No. 95-168, PP Docket No. 93-253 (Nov. 17, 1995) (citing Christopher Avery, "Strategic Jump Bidding in English Auctions," Working Paper, Kennedy School of Government, Harvard University, March 15, 1994).

enable bidders to conceal information, the phenomenon moves us away from the informational advantages of an ascending bid (multiple round) auction in the direction of a first-price sealed bid (single round) auction. As ISTA recognizes, jump bidding can complicate bidding strategy and deny bidders information about the number of bidders who would be willing to pay prices between the minimum acceptable bid and the jump bid.[389] In the absence of information about the bidders who would be willing to participate at intermediate bids, other bidders may feel compelled to shade their bids more than they would otherwise. This behavior is an attempt to avoid the "winner's curse," that is, the tendency for the winner to be the bidder who most overestimates the value of the item being auctioned.

144. As an initial matter, we note that recent changes designed to improve the Commission's electronic auction bidding process eliminate the dangers that a maximum bid increment is designed to avoid (e.g., jump bidding).[390] In an effort to speed the auction process and eliminate unwarranted "gaming" of our processes, the Commission has simplified the electronic auction bidding process by implementing "click box bidding".[391] As discussed above (see Section III.E.2, *supra*), this feature permits bidders to enter a bid only at the maximum bid increment as determined by the Commission, and thus makes bidding tactics such as jump bidding impossible. Nevertheless, we will reserve the discretion to employ a maximum bid increment should we return to an auction format in which jump bidding can in any way decrease the

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[389] ISTA Comments at 3.

[390] *See, e.g.*, "FCC Announces Changes to Auction Procedures for the 800 MHz SMR Auction (Auction No. 16)," Public Notice, DA 97-1934 (rel. September 5, 1997).

[391]*See* Mercury NALF.

competitiveness of an auction. In this regard, we disagree with NextWave's suggestion that by disallowing jump bids as one method by which bidders may obtain information about each other the Commission risks prolonging an auction.[392] On the contrary, the Commission has alternate methods (e.g., "click-box bidding", employing minimum bid increments and activity rules and increasing the number of rounds per day) to ensure that auctions close within a reasonable time.

6. Bid Withdrawal Payments

145. *Background.* Under our current rules, if a high bid is withdrawn prior to the close of a simultaneous multiple-round auction, the Commission will impose a bid withdrawal payment equal to the difference between the withdrawn bid and the amount of the winning bid the next time the license is offered by the Commission. No withdrawal payment is assessed if the subsequent winning bid exceeds the withdrawn bid. If a winning bidder defaults after the close of an auction, the defaulting bidder will be required to pay the foregoing payment plus an additional payment of 3 percent of the subsequent winning bid or its own withdrawn bid, whichever is lower.[393]

146. We adopted these bid withdrawal rules in the *Competitive Bidding Second Report and Order* and determined that they would discourage insincere bidding without causing bidders to be too cautious in attempting to aggregate licenses.[394] However, in the Atlanta Trunking Order, we held that in some cases of erroneous bids, full application of the bid withdrawal

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[392] NextWave Reply Comments at 8.

[393] 47 C.F.R. § 1.2104(g).

[394] *See* Competitive Bidding Second Report and Order, 9 FCC Rcd at 2373- 74, pp 146-153.

payment provisions could impose an extreme and unnecessary hardship on bidders and that some relief appears necessary.[395] We also noted that it may be extremely difficult for the Commission to distinguish between " honest" erroneous bids and "strategic" bids that appear erroneous. We therefore fashioned guidelines in the Atlanta Trunking Order to provide for reduced bid withdrawal payments in cases of erroneous bids that balance issues of fairness to bidders with the importance of discouraging insincere bidding. We later modified the broadband PCS rules for the D, E, and F blocks to establish similar provisions governing the withdrawal of erroneous bids.[396] In the Notice, we proposed to amend Sections 1.2104 and 1.2109 of our rules to establish similar provisions to apply to all future auctions.[397]

147. *Discussion.* As discussed above (see Section III.E.2, *supra*), we recently implemented "click box bidding" in an effort to improve the auction process and eliminate erroneous bids. We also have recently modified the electronic bidding

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[395] *See* Atlanta Trunking Associates, Inc. and MAP Wireless L.L.C. Requests to Waive Bid Withdrawal Payment Provisions, Order, 11 FCC Rcd 17189, FCC 96-203 (May 3, 1996) ("Atlanta Trunking Order") and Georgia Independent PCS Corporation Request to Waive Bid Withdrawal Payment Provision, Order, DA 96-706 11 FCC Rcd 13728 (May 6, 1996). *See also* Atlanta Trunking Associates, Inc. and MAP Wireless, L.L.C., Petition for Reconsideration of Bid Withdrawal Payment and Georgia Independent PCS Corp., Application for Review of Request to Waive Bid Withdrawal Payment Provision, Memorandum Opinion and Order, FCC 97-154, 12 FCC Rcd 6382 (rel. May 6, 1997) (waiving the full bid withdrawal payments assessed against these parties after a finding that the Commission's remote bidding system may have contributed to some confusion leading to the submission of the erroneous bids).

[396] D. E. and F Block Report and Order, 11 FCC Rcd at 7896, pp 152-54.

[397] *See* Notice at p 92.

format to limit withdrawals. As a result of such changes, the types of erroneous bids discussed in the Notice cannot occur under our new bidding format. We therefore conclude that our proposal regarding decreased bid withdrawal payments in cases of erroneous bids is moot.

7. Misuse of Bid Withdrawals

148. *Background.* As we indicated in the Notice, in prior auctions we have found that allowing bid withdrawals risks encouraging insincere bidding and the use of withdrawals for anti-competitive strategic purposes, such as signaling other bidders.[398] We therefore sought comment on whether we should exercise our authority to limit withdrawals, and if so, under what circumstances.[399] Finally, we sought comment on other ways to address the concern about strategic withdrawals without unduly affecting bidders' ability to efficiently aggregate licenses, such as increasing the withdrawal payment or changing its structure.[400]

149. *Discussion.* Several commenters oppose the Commission's proposal to place limits on bid withdrawals in certain circumstances as a means of avoiding strategic withdrawals that are intended for anti-competitive purposes.[401] Both AT&T and Merlin argue that the ability to withdraw bids

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[398] *See* Notice at p 90. *See also* Competitive Bidding Second Report and Order, 9 FCC Rcd at 2373-74, pp 146-153; Mercury NALF.

[399] *Notice* at ¶ 93.

[400] *Id.*

[401] *See* AT&T Comments at 5-6; PageNet Comments at 13-14; AirTouch Comments at 11; Merlin Reply Comments at 5-6.

is critical to a bidder's auction strategy.[402] While they recognize the difficulty in determining the true intent behind a withdrawn bid, these commenters suggest that the Commission continue to monitor each auction carefully, and address abusive behavior on a case-by-case basis.[403] Similarly, PageNet states that the Commission should not limit bid withdrawals as they are critical to providing applicants with the flexibility to correct bids that are placed in error and to quickly change bidding strategy.[404] PageNet contends that concerns about strategic withdrawals intended to produce anti-competitive results are not sufficient to eliminate the bidding flexibility that bid withdrawals provide.[405] Finally, AirTouch suggests that the Commission permit bid withdrawals at any time, subject to certain conditions.[406] In particular, AirTouch recommends that: (1) all bid withdrawals should be subject to applicable bid withdrawal payments; (2) a bidder withdrawing a bid should not be permitted to regain eligibility on any bidding units lost as a result of the withdrawal; and (3) the high bidder in the round prior to the withdrawn bid should be permitted to bid again on the license, and to reacquire eligibility for bidding units necessary to resubmit the new bid.[407]

150. In contrast, NextWave supports a limitation on bid withdrawals. NextWave states that bid withdrawals are a necessary tool, but in some instances, bid withdrawals are used

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[402] AT&T Comments at 5-6; Merlin Reply Comments at 5-6.

[403] AT&T Comments at 5-6; Merlin Reply Comments at 5-6.

[404] PageNet Comments at 13-14.

[405] PageNet Comments at 14.

[406] AirTouch Comments at 11.

[407] AirTouch Comments at 12.

for nsincere bidding designed to " game" the auction.[408] To protect against such misuse, NextWave proposes, for example, that the Commission create a fourth stage of the auction, during which a bidder who has withdrawn from a particular market would be prohibited from re-bidding in the same market.[409] In the past, we have recognized that allowing bid withdrawals facilitates efficient aggregation of licenses and pursuit of efficient backup strategies as information becomes available during the course of an auction. Nevertheless, we also have recognized that bidders may, in some instances, seek to remove bids for improper purposes, such as to delay the close of the auction for strategic purposes. For this reason, the Bureau has traditionally retained the discretion to limit withdrawals as part of the management of an auction.[410] To prevent strategic delays to the close of the auction, or other abuses, the Bureau should exercise its discretion assertively. In addition, the Bureau should consider limiting the number of rounds in which bidders may withdraw bids,[411] and to prevent bidders from bidding on a particular market if the Bureau finds that a bidder is abusing the Commission's bid withdrawal procedures. These are among the types of issues on which the Bureau will seek comment prior to the start of each future auction.[412]

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[408] NextWave Reply Comments at 9.

[409] *Id.*

[410] *See, e.g.*, "Auction of Broadband Personal Communications Services D, E and F Blocks -- Auction Notice and Filing Requirements," Public Notice, DA 96-1026 (rel. June 26, 1996).

[411] This practice was employed in the recently-completed 800 MHz SMR auction, and will be employed in the upcoming LMDS auction. *See* "FCC Announces Changes to Auction Procedures for the 800 MHz SMR Auction (Auction No. 16)," Public Notice, DA 97-1934 (rel. September 5, 1997); LMDS Pre-Auction Public Notice.

[412] *See* Section I.A., *supra*.

8. Reauction Versus Offering to Second Highest Bidder

151. *Background.* Under Section 1.2109(b) of the Commission's rules,[413] if a winning bidder withdraws its bid after the auction has closed or fails to remit the required down payment within ten business days after the Commission has issued a Public Notice announcing winning bidders, the bidder will have defaulted. In such event, Section 1.2109(b) provides that the Commission may, in its discretion, either re-auction the license to existing or new applicants or offer it to the other highest bidders (in descending order) at their final bids.[414] In the Notice, we requested comment on whether we should (1) retain Section 1.2109(b) in its current form; (2) modify the rule so that the Commission retains the discretion regardless of when a default occurs to offer the license only to the second highest bidder at its bid price; (3) modify the rule so that the Commission retains discretion to offer a license on which the winning bidder has defaulted on its down payment obligation only to the second highest bidder; (4) modify the rule so that the Commission retains discretion to offer a defaulted license to the highest losing bidders (in descending order of their bids), but only at the final bid level of the second highest bidder; or (5) modify the rule to require reauction of defaulted licenses regardless of when a default occurs.[415] In addition, we sought comment on whether we should modify Section 1.2109(b) to codify our statement in the Competitive Bidding Fifth Report

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[413] 47 C.F.R. § 1.2109(b).

[414] 47 C.F.R.§ 1.2109(b). If a winning bidder defaults on a license or is disqualified after having made the required down payment, the Commission will conduct another auction for the license, affording new parties an opportunity to file applications. *Id.*

[415] *Notice* at ¶ 97.

and Order[416] that where there are a relatively small number of low value licenses, and only a short time has passed since the initial auction, the Commission may choose to offer the license to the second highest bidder because the cost of conducting another auction may exceed the benefits. Finally, we requested that commenters favoring this option indicate the parameters that the Commission should employ in determining which licenses might be re-offered to bidders in the original aution.[417]

152. *Discussion*. We will modify Section 1.2109(b) to reserve the discretion to either reauction a defaulted license or offer it to the other highest bidders (in descending order) at their final bids.[418] Several commenters support the reauction of defaulted licenses because it helps to ensure that the price paid for a license is the current price, rather than the price that was applicable at the time the original auction occurred.[419] Only two commenters oppose reauction in all circumstances.[420] Airadigm and AMTA oppose providing the Commission with the discretion to reauction defaulted licenses because they believe that awarding licenses to the next highest bidder will be faster than reauctioning.[421] However, as we stated in the Notice, we have developed a computerized auction system and

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[416] *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5537, n.55.

[417] *See Notice* at ¶ 97.

[418] 47 C.F.R.§ 1.2109(b). If a winning bidder defaults on a license or is disqualified after having made the required down payment, the Commission will conduct another auction for the license, affording new parties an opportunity to file applications. *Id.*

[419] Nextel Comments at 8-9 and Reply Comments at 7.

[420] AMTA Comments at 15-16; Airadigm Comments at 16-17.

[421] Airadigm Comments at 16-17; AMTA Comments at 15-16.

conducted numerous auctions and we now believe that the costs of a reauction, even for a small number of relatively low value licenses, is generally minimal.[422] We also believe that the planned use of regularly scheduled quarterly auctions will ensure rapid reauction.[423]

153. Further, we note that re-offering a defaulted license to the next highest bidder (in descending order) at their final bids may not ensure that the license will be awarded to the bidder who values it the most highly. In particular, as the license is offered to bidders at the next highest bids, other parties can argue that they would pay more for the license if given the opportunity. In addition, when more than one license is being auctioned, aggregation strategies may shift during the course of the auction, affecting the value placed on any individual license by a particular bidder. As we discussed in the Notice, when we first adopted rules governing the licensing of defaulted licenses, we stated that "[i]n the event that a winning bidder in a simultaneous multiple-round auction defaults on its down payment obligations, the Commission will generally reauction the license either to existing or new applicants."[424] Noting that in some circumstances the costs of conducting a reauction may not always be justified, we reserved the discretion in cases in which the winning bidder defaults on its down payment obligation to offer a defaulted license to the highest losing bidders (in descending order of their bids) at their final bids if "only a small number of relatively low value

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[422] *See* Notice at p 96.

[423] *See* Notice at p 7 (providing for regularly scheduled quarterly auctions).

[424] *Notice* at ¶ 95, citing *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2374, ¶ 154 n.115.

licenses are to be reauctioned ...."[425]

154. Nextel and others suggest that the Commission should retain the discretion to award defaulted licenses to the next highest bidder only when the default occurs soon after the close of the auction and there has been no opportunity for parties to file petitions to deny.[426] Nextel suggests that in such an instance, there is little risk of a significant change in market price, and no risk of encouraging frivolous petitions to deny.[427] We are aware of the dangers of adopting a rule which could have the unfortunate consequence of encouraging the filing of frivolous petitions to deny. Nevertheless, we believe that by reserving the discretion to either reauction defaulted licenses or award them to the next highest bidder, the Commission will be in the best possible position to determine which option serves the public interest in each particular situation.

F. Anti-Collusion Rules

155. *Background.* In the *Competitive Bidding Second Report and Order* the Commission adopted rules designed to prevent and facilitate the detection of collusive conduct in order to enhance and ensure the competitiveness of both the auction process and the post-auction market structure.[428] Section 1.2105(c) of the Commission's rules requires that auction applicants identify on their short-form applications any parties with whom they have entered into any consortium

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[425] *Id.*

[426] Nextel Reply Comments at 7.

[427] *Id.*

[428] Competitive Bidding Second Report and Order, 9 FCC Rcd at 2385-2386, pp 221-226. *See also* 47 C.F.R.§ 1.2105(c).

arrangements, joint ventures, partnerships or other agreements or understandings which relate in any way to the competitive bidding process.[429] Applicants are also required to certify on their short-form applications that they have not entered into any explicit or implicit agreements, arrangements or understandings of any kind with any parties, other than those identified, regarding the amount of their bids, bidding strategies, or the particular markets on which they will or will not bid.[430] After short-form applications are filed and prior to the time that the winning bidder has made its required down payment, all bidders are prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies with other bidders that have applied to bid in the same geographic license area, unless such bidders are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application.[431] In addition, winning bidders are required to attach as an exhibit to their long-form application a detailed explanation of the terms and conditions and parties involved in any bidding consortia, joint venture, partnership or other agreement or arrangement they have entered into relating to the competitive bidding process prior to the close of bidding.[432] All such arrangements must have been finalized prior to the filing of short-form applications.[433]

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[429] 47 C.F.R.§ 1.2105(c)(1). *See also* Competitive Bidding Second Report and Order, 9 FCC Rcd at 2387, p 225.

[430] 47 C.F.R.§ 1.2105(a)(2)(ix).

[431] 47 C.F.R.§ 1.2105(c); Fourth Memorandum Opinion and Order in PP Docket No. 93-253, 9 FCC Rcd 6858, 6868 (1994); Competitive Bidding Second Report and Order, 9 FCC Rcd at 2387, p 225.

[432] 47 C.F.R.§ 1.2107(d).

[433] *See* 47 C.F.R.§ 1.2105(c)(1).

156. Under Section 1.2105(c)(4) of our rules, a party holding a non- controlling, attributable interest in one applicant may acquire an ownership interest, form a consortium with, or enter into a joint bidding arrangement with other applicants for the same geographic license area, provided that (1) the attributable interest holder certifies that it has not and will not communicate with any party concerning the bids or bidding strategies of more than one of the applicants in which it holds an attributable interest, has formed a consortium, or has entered into a joint bidding arrangement; and (2) the arrangements do not result in a change in control of any of the applicants.[434] In the Notice, we recognized that this exception, although helpful in facilitating the flow of capital to multiple applicants, is difficult to apply in a business setting.[435] In particular, we stated that entities are reluctant to invest in multiple applicants if they cannot obtain information about business plans and strategies, which often necessarily reflect bidding strategies or bids. We therefore proposed to modify this provision to permit entities to invest in multiple applicants, subject to certain conditions, if the original applicant withdraws from the auction.[436]

157. In the rule making proceeding adopting service-specific auction rules for paging services, several commenters suggested that discussions between bidders for the same license area regarding a business merger or acquisition may be construed as discussions of bidding or bidding strategy, and

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[434] 47 C.F.R.§ 1.2105(c)(4).

[435] Notice at p 100.

[436] *Id.* at p 101.

thus a violation of Section 1.2105(c)(4).[437] These commenters requested that the Commission create a "safe harbor" for discussions of certain non-auction related business matters between applicants for the same license areas to minimize any chilling effect on ongoing business acquisitions and transactions.[438] At that time, we stated that we did not believe a sufficient record had been established to enable us to make a decision on this proposal, and that we would more thoroughly examine this issue in our review of our general auction procedures.[439] In the Notice, we therefore sought comment on creation of such a "safe harbor," in light of efforts by the Commission and its staff to clarify the relationship between the anti-collusion rule and non-auction related business negotiations occurring during the time the anti-collusion rule applies to parties participating in an auction.[440] We also sought comment in the Notice on any other changes to our rules prohibiting collusion that commenters believe are warranted.[441] Finally, we sought comment on the public notices and letters issued by Commission staff interpreting and clarifying these rules.[442]

158. *Discussion.* We have taken this opportunity in

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[437] *See* AirTouch Comments at 37-40 and Arch Comments at 19-20, Paging Second Report and Order and Further Notice of Proposed Rule Making. *See also* MobileMedia Comments at 26 and Metrocall Comments at 21-22 filed in the same proceeding.

[438] *Id.*

[439] *Paging Second Report and Order and Further Notice of Proposed Rule Making* at ¶ 156.

[440] *Notice* at ¶ 102.

[441] *Notice* at ¶ 102.

[442] *Id.*

revisiting our general competitive bidding procedures to examine the effectiveness of the anti- collusion rule in the 15 auctions we have conducted to date. We continue to believe that our anti-collusion rules are necessary to deter bidders from engaging in anti-competitive behavior. Nevertheless, after careful review of the comments received in this proceeding, we have determined that some modifications to Section 1.2105(c) can be made which will benefit bidders in several respects, without jeopardizing the competitiveness and overall integrity of our auction program.

159. In the Collusion MO&O,[443] the Commission revisited the anti- collusion rules prior to the start of the PCS auctions, and concluded that allowing holders of non-controlling attributable interests in an applicant greater flexibility to form agreements with other applicants would help applicants to acquire the additional capital necessary to bid successfully for licenses. We therefore created an exception to the general rule contained in Section 1.2105 to permit a holder of a non-controlling attributable interest in one applicant for a particular license or licenses to obtain ownership interests in or enter into consortium arrangements with a second applicant for a license in the same geographic service area.[444] The attributable interest holder must certify to the Commission that it has observed and will observe certain restrictions on communication concerning the applicants in which it holds an attributable interest or with

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[443] *See* Implementation of Section 309(j) of the Communications Act - Competitive Bidding, WT Docket No. 93-253, Memorandum Opinion and Order, 9 FCC Rcd 7684 (1994) at 7687-89, pp 8-12 (1994) ("Collusion MO&O").

[444] For purposes of this rule, an "attributable" investor is one holding five percent or more of the applicant. *See* 47 C.F.R.§ 1.2105(c)(4).

which it has entered into a bidding arrangement.[445]

160. After considering the comments filed in response to our proposals in the Notice, we have decided to adopt a second exception to our general rules prohibiting collusion.[446] Specifically, we will permit a holder of a non- controlling attributable interest in an applicant to obtain an ownership interest in or enter into a consortium arrangement with another applicant for a license in the same geographic area provided that the original applicant has withdrawn from the auction, is no longer placing bids, and has no further eligibility. To meet the requirements of this exception, the attributable interest holder will be required to certify to the Commission that it did not communicate with the new applicant prior to the date the original applicant withdrew from the auction, and that it will not convey bidding information, or otherwise serve as a nexus between the previous applicant and the new applicant. As stated in the Notice, this additional exception will further facilitate the flow of capital to auction applicants by encouraging, and providing the flexibility necessary for, non-controlling investors to invest in other auction applicants if their original applicant fails to complete the auction.[447] The majority of commenters addressing this proposal agree that it will encourage investment in auction applicants without threatening the overall competitiveness of the auction process.[448]

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[445] *Id. See also* Collusion MO&O, 9 FCC Rcd at 7688-89, p 11.

[446] *See* 47 C.F.R.§ 1.2105(c).

[447] *Id.*

[448] *See* Airadigm Comments at 17 and Reply Comments at 7; AT&T Comments at 7; CII Comments at 20; ISTA Comments at 3.

161. Only Nextel and PageNet oppose this exception, citing the potential for collusive activity when an investor in an applicant that has chosen to withdraw from the auction explores possible investments in other applicants, thus learning bidding strategies of multiple auction participants.[449] In addition, PageNet contends that this exception could encourage speculation which would threaten the integrity of the auction process and ultimately result in lower prices paid for the spectrum.[450] However, after balancing these factors, we believe that the benefits of this certification requirement, in particular the likelihood that auction applicants will be able to attract increased investment, exceed any possible disadvantages. The Commission requires that auction applicants certify to the truthfulness and accuracy of a number of issues on their Form 175 applications, and to make minor amendments when necessary. We believe that applicants are no more likely to make false certifications about the exception which we adopt today than about other information on the form. As discussed *infra*, we also remind prospective applicants that the Commission will conduct a detailed investigation in the event it becomes aware of a possible violation of the anti-collusion rule, and that violations may result in the loss of the down payment or full bid amount, the cancellation of licenses, and preclusion from participation in future auctions.

162. Commenters in both the Paging proceeding and in this proceeding[451] support the creation of a safe harbor for

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[449] *See* Nextel Comments at 9-10 and Reply Comments at 8; PageNet Comments at 15.

[450] PageNet Comments at 15.

[451] *See* Metrocall Comments at 4; AT&T Comments at 7; PCIA Comments at 5-6; AMTA Comments at 16; PageNet Comments at 14; AirTouch Comments at 12-13, Reply Comments at 7; CII Comments at 19-

discussions of certain non-auction related business matters between applicants for the same license areas. In general, these commenters argue that (1) the Commission's anti- collusion rules cause unnecessary confusion in their current form,[452] (2) the purposes of the anti-collusion rules would not be threatened by such a safe harbor,[453] and (3) existing antitrust laws and policies will adequately accomplish the goal of protecting the competitiveness of the bidding process.[454] As our auction program has evolved, we have continued to refine and clarify for bidders the operation and impact of the anti-collusion rule upon bidder conduct during the course of an auction.[455] Prior to the start of the broadband PCS D, E and F block auction, the Bureau received numerous inquiries concerning the impact of these rules upon business contacts between current broadband PCS licensees and auction winners and eligible participants in

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20; ISTA Comments at 3; Nextel Reply Comments at 3-4; CellNet Reply Comments at 5.

[452] AT&T Comments at 6-7.

[453] *See* Metrocall Comments at 4; AT&T Comments at 7.

[454] AT&T Comments at 6-7.

[455] *See* Public Notice, "Wireless Telecommunications Bureau Provides Guidance on the Anti-Collusion Rules for D, E and F Block Bidders," DA 96-1460 (August 28, 1996) ("August 28 Public Notice"); Public Notice, "FCC Staff Clarifies Application of Anti-Collusion Rule to Broadband PCS 'C' Block Reauction," DA 96-929 (June 10, 1996) ("June 10 Public Notice"); Public Notice, "Wireless Telecommunications Bureau Clarifies Spectrum Auction Anti- Collusion Rules, DA 95-2244 (Oct. 26, 1995); News Release, "Staff Adopts Order and Releases Letters Clarifying Issues on Broadband PCS Auctions" (Oct. 26, 1994); Letter from William E. Kennard, FCC, to Gary M. Epstein & James H. Barker, Oct. 25, 1994; Letter from Rosalind K. Allen, FCC, to R. Michael Senkowski, Dec. 1, 1994; Letter from Rosalind K. Allen, FCC, to Leonard J. Kennedy, Dec. 14, 1994; Letter from Kathleen O'Brien Ham, FCC, to Mark Grady, Apr. 16, 1996; Letter from Kathleen O'Brien Ham, FCC, to David L. Nace, DA 96-1566, Sept. 17, 1996.

the ongoing broadband PCS D, E and F Block auction. In response to these inquiries, the Bureau released a Public Notice providing guidance on these business negotiations in the context of our anti-collusion rules.[456] The Bureau emphasized that Section 1.2105(c) may affect the way in which auction applicants conduct their routine business during an auction by placing significant limitations upon their ability to pursue business opportunities involving services in the geographic areas for which they have applied to bid for licenses.[457] These interpretations have provided sufficient guidance concerning the types of non-auction related communications which are permitted under Section 1.2105(c), and we therefore decline to create such a safe harbor.

163. We affirm the Bureau's interpretation of this aspect of the anti- collusion rule. As a general matter, the anti-collusion rule does not prohibit non auction-related business negotiations between auction applicants who have applied for the same geographic service areas. We caution auction applicants, however, that discussions concerning, but not limited to, issues such as management, resale, roaming, interconnection, partitioning and disaggregation may all raise impermissible subject matter for discussion because they may convey pricing information and bidding strategy.[458] Because auction applicants should avoid all discussions with each other that will likely affect bids or bidding strategies, we believe that individual applicants, and not the Commission, are in the best position to determine in the first instance which

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[456] *June 10 Public Notice.*

[457] *Id.* at 2.

[458] *See* Letter from Kathleen O'Brien Ham, FCC, to David L. Nace, DA 96- 1566, Sept. 17, 1996, at 1-2.

communications are permissible and which are not.[459]

164. As discussed above, the Notice also invited comment on any other changes to our rules prohibiting collusion that commenters believe are warranted.[460] Section 1.2105(c)(6)(i) of our rules provides that, for purposes of the anti-collusion rule, an applicant is defined as an entity submitting a short-form application, as well as all holders of partnership, ownership, and any stock interest amounting to five percent or more of the entity.[461] One commenter, the Coalition of Institutional Investors ("CII"), states that defining any holder of five percent or more of an auction applicant as part of the applicant for purposes of the Commission's anti- collusion rules unnecessarily restricts applicants' abilities to obtain financing from a variety of sources.[462] After careful consideration of the issue, we agree with CII. Therefore, we will increase the attribution standard contained in Section 1.2105(c)(6)(i) to 10 percent, or any holder of a controlling interest in the applicant.[463]

165. A higher attribution standard will facilitate the flow of capital to applicants by enabling parties to make investments in multiple applicants, including applicants for licenses in the same geographic areas. Our decision to use an attribution threshold of 10 percent is consistent with the change we make to our general reporting requirement (see Section III.C.3, *supra*). We recognize that some potential for collusion exists

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[459] *See August 28 Public Notice.*

[460] *Notice* at ¶ 102.

[461] 47 C.F.R. § 1.2105(c)(6)(i).

[462] CII Comments at 18-19.

[463] *See* 47 C.F.R. § 1,2105(c)(6)(i).

whenever an entity is permitted to hold an interest in more than one applicant for licenses in the same geographic service area. However, we reemphasize that auction applicants and their owners continue to be subject to existing antitrust laws, and that conduct that is permissible under the Commission's rules may be prohibited by the antitrust statute.[464] In addition, we remind prospective auction participants that we will continue to scrutinize carefully any instances in which bidding patterns suggest that collusion may be occurring.

166. Finally, we reemphasize that the Commission will aggressively investigate any allegations that an auction participant has violated Section 1.2105(c).[465] Bidders who are found to have violated the Commission's anti-collusion rules may, among other sanctions, be subject to the loss of their down payment or their full bid amount, face the cancellation of their licenses, and may be prohibited from participating in future auctions.[466]In addition, where allegations appear to give rise to violations of the federal antitrust laws, the Commission may

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[464] *See Collusion MO&O*, 9 FCC Rcd at 7684, ¶ 12.

[465] *See* Competitive Bidding Second Report and Order, 9 FCC Rcd at 2388, p 226. *See also* August 28 Public Notice at 3-4.

[466] *See* Commercial Realty St. Pete, Notice of Apparent Liability for Forfeiture, FCC 95-58, 10 FCC Rcd 4277 (1995) (assessing two $10,000 forfeitures for violations of the Commission's anti-collusion rules during the IVDS auction); Application of Mercury PCS II, L.L.C. for Authority to Construct and Operate Broadband PCS Systems on Frequency Blocks D, E, and F, Memorandum Opinion and Order, DA 97-1782 (rel. August 21, 1997) (conditioning the final grant of an applicant's licenses on any action that may be taken based on the outcome of any investigation conducted by the Commission or the Department of Justice regarding bid signaling or other bidding activity); Mercury NALF (assessing a $650,000 forfeiture for an apparent violation of Section 1.2105(c) by placing trailing numbers at the end of its bids to disclose its bidding strategy in a reflexive manner that invited collusive behavior).

investigate and/or refer such cases to the United States Department of Justice for investigation.[467]

G. Pre-grant Construction

167. *Background.* Section 22.143 of the Commission's rules permits auction winners in the Public Mobile Services to begin construction of facilities prior to the grant of their applications, at their own risk and subject to certain exceptions, 35 days after the date of the public notice listing the application for that facility as acceptable for filing.[468] In the Notice, we proposed to extend similar pre-grant construction rules to all auction winners, regardless of whether petitions to deny have been filed against their long-form applications.[469] We further proposed to permit each auction winner to begin construction of its system, at its own risk, upon release of a public notice announcing that their post-auction long-form applications were accepted for filing. We tentatively concluded that to do so would further the public interest by expediting, in most cases, the initiation of service to the public.[470]

168. *Discussion.* We will adopt our proposal in the Notice to permit applicants for all licenses awarded by competitive bidding to begin construction of facilities prior to the grant of their applications. All commenters addressing the issue support our proposal to permit license applicants to begin construction of their facilities, at their own risk, upon release of a public notice announcing the acceptance for filing of post-auction

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[467] *Id.*

[468] *See* 47 C.F.R. § 22.143.

[469] *Notice* at ¶ 104.

[470] *Id.*

long-form applications.[471] These commenters agree that allowing pre-grant construction furthers the statutory objective of rapidly deploying new technologies, products, and services for the benefit of the public.[472]

169. Commenters also support our proposal to permit license applicants with petitions to deny filed against their long-form applications to begin construction of their facilities at the same time as license applicants whose licenses are not the subject of pending petitions to deny.[473] While our current service-specific rules require as a condition for pre-grant construction no pending petitions to deny,[474] we conclude that the merits of petitions to deny may be judged by an applicant and factored into its assessment of the risk of proceeding with construction before license grant.[475] We therefore adopt a pre-grant construction rule for all services subject to competitive bidding that permits construction by applicants that are subject to petitions to deny. Of course, pre-grant construction will be subject to any service-related restrictions, including but not limited to antenna restrictions, environmental requirements, and international coordination. Any applicant engaging in pre-grant construction activity does so entirely at its own risk, and the Commission will not take such activity into account in ruling

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[471] *See* PCIA Comments at 6; PageNet Comments at 16, AMTA Comments at 17; CTIA Comments at 1; AirTouch Comments at 13 and Reply Comments at 6; Airadigm Comments at 18; NextWave Reply Comments at 9-10.

[472] 47 U.S.C.§ 309(j)(3)(A).

[473] *See* CTIA Comments at 1; CTIA Comments at 1; AirTouch Comments at 13, Reply Comments at 6; NextWave Reply Comments at 9-10.

[474] *See, e.g.*, 47 C.F.R.§ 22.143(d)(1).

[475] *See, e.g.*, PCIA Comments at 6.

on any petition to deny. Finally, we note that we expect our licensing process to be more rapid generally in light of the shortened petition to deny period permitted by the Balanced Budget Act.[476]

IV. SECOND FURTHER NOTICE OF PROPOSED RULE MAKING

A. Rules Governing Designated Entities

1. Designated Entities

170. *Background.* Section 309(j)(4)(D) of the Communications Act provides that in prescribing rules for a competitive bidding system, the Commission shall "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services." The statute further provides that for this purpose, the Commission shall consider the use of tax certificates, bidding credits and other procedures. In addition, pursuant to Section 309(j)(4)(A), the Commission shall "consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods," in order to "disseminat[e] licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."[477] Pursuant to these mandates, the Commission has adopted a number of measures, including entrepreneur blocks, bidding credits, reduced upfront

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[476] Balanced Budget Act,§ 3008.

[477] 47 C.F.R.§§ 309(j)(3)(B) and (j)(4)(A).

payments/down payments and installment payments.[478]

171. In addition, Section 257 of the Telecommunications Act requires the Commission to identify and eliminate market entry barriers for small and entrepreneurial telecommunications businesses. We are committed to completing a study to examine barriers encountered by minorities and women in the auctions process and in the secondary market for licenses.[479] We have initiated this process with regard to the study on secondary markets, and will initiate the auctions study expeditiously. We will release the results in 1998.

172. Any measures that we decide to adopt that give special preferences specifically to minority- and women-owned businesses must comply with recent Supreme Court decisions, as discussed below. To that end, we seek comment on (1) whether there is a compelling governmental interest that would justify the use of preferences for minority-owned businesses and "exceedingly persuasive justification" for preferences for women-owned businesses; (2) what evidence supports the commenter's position on the issue; and (3) what measures, if any, could be narrowly tailored to withstand judicial review. The specific issues that commenters should address are discussed in more detail below.

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[478] *See* generally The FCC Report to Congress on Spectrum Auctions, FCC 97-353 (rel. Oct. 9, 1997). Congress repealed, as of January 17, 1995, that portion of section 1071 of the Internal Revenue Code, 26 U.S.C.§ 1071, under which the Commission administered the tax certificate program. *See* Self- Employed Health Insurance Act, H.R. 831,§ 2(d).

[479] *See* Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, GN Docket No. 96-113, Report, 12 FCC Rcd 16802 (1997) ("Section 257 Report").

173. *Discussion*

a. Minority-based designated entity provisions

174. As we have recognized in the past, in Adarand Constructors, Inc. v. Pena, the Supreme Court established that governmental policies that take race into account are reviewed under a strict (as opposed to intermediate) scrutiny standard.[480] We tentatively conclude that, to the extent consistent with constitutional standards, we should take steps to further our statutory mandate to ensure that minorities have the opportunity to engage in the provision of spectrum services pursuant to Section 309(j)(4). We seek comment on how we can modify our designated entity provisions, consistent with the standards set forth in Adarand. In particular, we seek comment on what tools, such as bidding credits, might be used consistent with

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[480] Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) ("Adarand"). *See* Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, GN Docket No. 96-113, Notice of Inquiry, 11 FCC Rcd 6280, 6309-15 (1996); Section 257 Report, 12 FCC Rcd 16802, 16927-30. The Commission also has sought comment on post-Adarand provisions for minority- and women-owned businesses in a number of service- specific rule making proceedings. *See, e.g.*, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93- 253, Amendment of the Commission's Cellular PCS Cross-Ownership Rule, GN Docket No. 90-314, Implementation of Sections 3(n) and 332 of the Communications Act -- Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Further Notice of Proposed Rule Making, 10 FCC Rcd 1872, 1877-79 (1995); *See also* Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89-552, Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 220-222 MHz, PP Docket No. 93-252, Second Memorandum Opinion and Order and Third Notice of Proposed Rule Making, 11 FCC Rcd 188, 266-67 (1995).

Adarand. In addition, we seek comment on whether we should limit any tools designed to ensure that minority-owned businesses have the chance to take part in our auction program to those minority-owned businesses that also qualify as small businesses. Commenters advocating the adoption of such measures should address the constitutional issue and present specific empirical evidence supporting their views.

175. Should we determine that provisions for minorities would withstand strict scrutiny as required by Adarand, we also seek comment on appropriate eligibility standards for applicants seeking to qualify for minority-based provisions. For example, we could specify that to qualify for any minority- based provisions, an applicant must be minority-controlled (i.e., minorities must have de facto as well as de jure control of the applicant and must own more than 50 percent of the equity on a fully diluted basis) and meet the eligibility requirements set forth in 47 C.F.R. § 1.2110(b)(2).[481] Alternatively, to ensure that any minority policies are reserved for businesses in which minorities have a substantial financial stake, as well as de jure and de facto control, we could strictly define equity to require that minorities have the right to receive at least 50.1 percent of the annual distribution of any dividends paid on the voting stock and the right to receive dividends, profits, and other

[481] Section 1.2110(b)(2) requires that minority owners must have a controlling interest in the applicant, must own on a fully diluted basis 50.1 percent of the equity, and in the case of corporate applicants, must hold at least 50.1 percent of the voting stock or, in the case of partnerships, all general partners must be minorities (or entities 100 percent owned or controlled by minorities), and minorities must collectively own at least 50.1 percent of the partnership equity. As discussed above, we also note that the Office of Management and Budget recently modified the definition of the term "minority" contained in Statistical Policy Directive No. 15, Race and Ethnic Standards for Federal Statistics and Administrative Reporting. *See* 62 Fed. Reg. 58782 (October 30, 1997).

distributions from the business in proportion to their equity interests.[482] This requirement would be similar to the eligibility standards for minority-owned businesses adopted but never implemented for the broadband PCS auctions, and to the eligibility standards recently proposed for the auction of pending broadcast license applications.[483] In addition, we seek comment on alternate formulas that might be appropriate for determining eligibility for minority-based provisions.[484]

[482] We note that these restrictions differ from the benchmarks used to attribute ownership of broadcast stations for purpose of our multiple ownership restrictions set forth in 47 C.F.R.§ 73.3555, where the intent is to identify ownership interests in, or relationships to, a licensee potentially conferring the ability to influence or control the operations of a licensee, including core functions, such as programming. Notice of Proposed Rulemaking in MM Docket No. 94-150, et al. 10 FCC Rcd 3606, 3614 (1995); Attribution of Ownership Interests, 97 FCC 2d 997, 999, 1005 (1984), recon. 58 RR 2d 604 (1985), further recon. 1 FCC Rcd 802 (1986). For that purpose, ownership interests below 50% are attributed but nonvoting and other passive interests are generally disregarded. Our tentative view is that a more restrictive approach is warranted here to safeguard the integrity of our minority ownership policy by strictly limiting it to circumstances in which minority owners will have de facto and de jure control of the license.

[483] *See* Broadcast NPRM at p 88.

[484] *See, e.g.*, Implementation of Section 309(j) of the Communications Act (Fifth Report and Order), 9 FCC Rcd 5532, 5611-13 pp 183, 185 (1994), recon. Fifth Memorandum Opinion and Order, 10 FCC Rcd 403 (1994), modified, Sixth Report and Order, 11 FCC Rcd 136 (1995), aff'd sub nom, Omnipoint v. FCC, 78 F.3d 620 (D.C.. Cir. 1996) (due to the "exceptionally great financial resources" required by broadband PCS applicants, they qualify for preferential treatment so long as minorities hold 25 percent of the equity and 50.1 percent of the voting stock, provided no single investor holds 25 percent of the corporation's passive equity). The favorable bidding credits originally intended to enhance the opportunities of minority- and female-owned small businesses were suspended after the decision in Adarand. In Omnipoint the court upheld our decision in the Sixth Report and Order to make these credits available to small businesses

176. We also observe that the Office of Management and Budget ("OMB") recently modified its standards for the classification of federal data on race and ethnicity.[485] Specifically, OMB: (1) separated the category for Asian and Pacific Islander category into two categories -- "Asian" and " Native Hawaiian or Other Pacific Islander"; and (2) changed the term "Hispanic" to "Hispanic or Latino". We previously have used this standard to define the term "minority" for purposes of our designated entity provisions,[486] and seek comment on whether we should similarly amend the current definition in our rules.[487]

b. Gender-based designated entity provisions

177. We seek comment on whether special policies are warranted for female- owned applicants. We note that the constitutionality of our former practice of awarding comparative preferences for female ownership was not

following Adarand.

[485] *See* Office of Management and Budget, Revisions to the Standards for the Classification of Federal Data on Race Ethnicity, Notice of Decision, 62 Fed Reg 58782 (October 30, 1997).

[486] *See* Competitive Bidding Fifth Memorandum Opinion and Order, 10 FCC Rcd at 432 p 52 (1994) (revising 47 C.F.R.§ 24.720(i) to conform with the definition of "minority" found at, inter alia, 47 U.S.C.§ 309(i)(3)(c)(ii) and 47 C.F.R.§ 1.1621(b)). *See also* Broadcast Equal Employment Opportunity Rules and FCC Form 395, 70 FCC 2d 1466, 1473 (1979); Race and Ethnic Standards for Federal Statistics and Administration Reporting, OMB Statistical Policy Directive No. 15 (1977).

[487] 47 C.F.R.§ 1.2110(b)(2).

addressed by the Supreme Court in Metro[488] and that we suspended that practice following Lamprecht v. FCC, 958 F.2d 382 (D.C. Cir. 1992), which held, under "intermediate" scrutiny, that our gender preference was not shown to be substantially related to achieving program diversity and that it was thus unconstitutional.. More recently, the Supreme Court has ruled that a state program, which makes distinctions based upon gender, must be supported by an "exceedingly persuasive justification" in order to withstand constitutional muster. United States v. Virginia Military Institute, 116 S.Ct 2264, 2274- 76 (1996). We seek comment on whether there is sufficient evidence to justify special provisions for women-owned businesses under that standard.

178. As with minority-based provisions, we tentatively conclude that to the extent consistent with applicable constitutional standards, we should take steps to further our statutory goal of making certain that women have the opportunity to provide spectrum-based services pursuant to Section 309(j)(4). We seek comment on how we can modify our designated entity provisions, consistent with the standards set forth in recent court decisions. In particular, we seek comment on what tools, such as bidding credits, might be used consistent with judicial precedent. In addition, we seek comment on whether we should limit any tools designed to encourage participation in our auction program by women-owned businesses that also qualify as small businesses. Commenters advocating the adoption of such measures at this time should address the constitutional issue and present specific

[488] Metro Broadcasting Inc. v. FCC, 497 U.S. 547 (1990) (applying an intermediate scrutiny standard, the Supreme Court upheld the constitutionality of our treatment of minority ownership policies in comparative proceedings).

empirical evidence supporting their views.

c. Rural Telephone Company provisions

179. In the Commission's recent report to Congress on the spectrum auctions, we stated our belief that auctions have generally provided rural telephone companies with favorable opportunities.[489] We observed that, to date, rural telephone companies have won about 44 percent of the 123 rural Basic Trading Areas (BTA) licenses in the United States and we noted some examples of rural telephone companies' successes in offering broadband PCS.[490] In keeping with our duties under the Act, however, we seek comment on whether there are mechanisms that might further opportunities for rural telephone companies to provide spectrum based services.

2. Installment Payments

180. *Background.* We are required by statute to provide incentives to ensure participation by small businesses and other "designated entities" when implementing our authority to conduct auctions, as set forth in Section 309(j) of the Communications Act.[491] Among other methods, allowing winning bidders to pay for their licenses using installment plans has been one method we have used to encourage small business involvement in the wireless marketplace. As discussed in Section III.B.5, *supra*, in this *Third Report and Order* we suspend the use of installment payments for the foreseeable future. In lieu of installment payments, we have adopted a

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[489] The FCC Report to Congress on Spectrum Auctions, WT Docket 97-150, at p. 25 (rel. Oct. 9, 1997).

[490] *Id.* at 25-26.

[491] 47 U.S.C. §§ 309(j)$0(A), (D).

schedule of bidding credits applicable to small businesses that is higher than that which we originally proposed.[492]

181. *Discussion.* We observed in the Notice in this docket that small businesses have been successful in the auctions in which installment payments plans were offered.[493] We therefore seek comment on ways in which the Commission can provide an effective installment payment program while at the same time minimizing the concerns (e.g., licensee default or difficulty meeting financial obligations to the Commission) that have led to our decision to suspend the use of installment payments for the present time. We seek comment, for example, on how the Commission can create an installment payment plan which fulfills our sometimes incongruent goals of encouraging only serious, financially qualified small business applicants to apply for licenses, ensuring the rapid provision of service to the public, and guaranteeing that the American public is reasonably compensated for the use of the spectrum being auctioned. We also seek comment on how the Commission might fashion an installment payment program that is consistent with the provision of the Balanced Budget Act that requires that all proceeds from certain future auctions be deposited in the United States Treasury not later than September 30, 2002. In this regard, we note that under most of the installment payment plans previously offered by the Commission, winning bidders have been permitted to pay for their licenses over the entire 10 year license term.[494] If we were to make installment plans available in the future, we interpret this legislation as requiring that all payments of principal and interest for covered auctions

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[492] *See* Section III.B.5., *supra*. *See also, Notice* at ¶ 32.

[493] *Notice* at ¶ 34.

[494] *See, e.g.*, 47 C.F.R. § 24.711(b)(1).

be deposited in the United States Treasury by the statutory deadline for collection, which is approximately five years away. Finally, we seek comment on means other than bidding credits and installment payments by which the Commission might facilitate the participation of small businesses and other designated entities in our spectrum auction program. Commenters should provide sufficient detail to assist the Commission in fashioning a program based upon their comments.

182. We also note that under our current rules, winning bidders that are designated entities are not required to pay their second down payment until petitions to deny filed against them are dismissed or denied. In the interim, designated entity winning bidders for the same auction with no petitions filed against them are required to submit their second down payments earlier because their licenses are ready for grant. Because Section 1.2110(e)(3)(i) of our rules provides that interest rates on installment payments will be based on the rate of U.S. Treasury obligations at the time of licensing, in previous auctions this has had the result of establishing different rates of interest on installment payments for winning bidders in the same auction.[495] In the event we reinstate installment payments in the future, we seek comment on whether we should establish the interest rate based upon the rate of U.S. Treasury obligations on the date of the close of the auction. We also seek comment on one aspect of our rules relating to the calculation of the total default payment owed where a winning bidder defaults on multiple licenses.

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[495] *See* "Comment Requested on 7 Percent Interest Rate Imposed on C Block Installment Payment Plan Notes," Public Notice, DA 97-1152 (rel. June 2, 1997) (in which the Bureau sought comment on several requests for of the interest rate assigned to PCS C block licensees conditionally granted on September 17, 1996).

3. Attribution of Gross Revenues of Investors and Affiliates

183. *Background.* In the Notice, we proposed to adopt uniform rules and definitions for the attribution of gross revenues of investors and affiliates for all auctionable services. Some of our service-specific competitive bidding rules require that, in determining whether an applicant meets certain size-based eligibility requirements, we consider, among other things, the gross revenues of certain investors in the applicant and the affiliates of attributable investors. These service-specific rules have established varying standards of attribution. For example, in both narrowband and broadband PCS, the gross revenues and total assets of an applicant, together with those of its affiliates and persons who hold an interest in the applicant or its affiliates, must be below a certain threshold in order for the applicant to qualify as a small business or entrepreneur.[496] However, in order to avoid counting the revenue of all of these entities, the rules for each service provide different exceptions whereby the applicants can create control groups. [497] For example, our broadband PCS rules provide two control group exceptions,[498] while our narrowband PCS rules provide only one control group exception.

184. In the 900 MHz SMR service, to determine whether an applicant qualifies as a small business, we attribute the revenues of parties holding partnership and other ownership interests and any stock interest amounting to 20 percent or more

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[496] The total assets test has been used only to determine entrepreneur status.

[497] *See, e.g.*, 47 C.F.R.§ 24.709(b)(3), (b)(5). A control group is an entity, or a group of individuals or entities, that possesses de jure and de facto control of an applicant or licensee.

[498] 47 C.F.R.§ 24.709(b).

of the equity, or outstanding stock, or outstanding voting stock of the applicant in conformance with the Commercial Mobile Radio Service (CMRS) spectrum cap attribution standard.[499] In contrast, under our MDS rules we attribute the gross revenues of the applicant and all of the applicant's affiliates (as defined in 47 C.F.R. § 1.2110(b)(4)).[500]

185. *Discussion.* In the Notice, we proposed to adopt a "controlling interest" standard, similar to that which we have recently adopted in our rules for LMDS,[501] as our general attribution rule for all future auctions. Under this standard, determination of eligibility for small business provisions would be made by attributing the gross revenues only of principals of the applicant who exercise both "de jure" and "de facto" control, and their affiliates. Nevertheless, we seek further comment on the controlling interest standard, and whether it is sufficient to calculate size so that only those entities truly meriting small business status qualify for bidding credits. We also ask commenters whether alternate standards for attributing the gross revenues of investors and affiliates in an applicant would better meet our goals. Commenters should specify what alternatives could be applied.

186. We note that our intent in proposing this standard is to provide flexibility that will enable legitimate small businesses to attract passive financing in a highly competitive

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[499] 47 C.F.R. § 90.814(g). *See* 47 C.F.R. § 20.6 (CMRS Spectrum Cap).

[500] 47 C.F.R. § 21.961(b).

[501] *See, e.g.*, In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding - Tenth Report and Order, PP Docket No. 93-253 (rel. November 21, 1996) (IVDS); LMDS Second Report and Order at p 352 (LMDS).

and evolving telecommunications marketplace.[502] In the Notice, we preliminarily concluded that structuring our standard in this manner will not invite abuse. In this regard, we seek comment on whether this proposed standard would be strengthened by imposing a minimum equity requirement (e.g., 15 percent) that any person or entity identified as controlling must hold. Alternatively, we ask whether we should not adopt a minimum equity requirement, but rather indicate only that an absence of equity would raise a question as to whether de facto control exists.

187. We note that for purposes of calculating equity held in an applicant, we provide for full dilution of certain stock interests, warrants, etc.[503] Finally, we note that we require detailed reporting of all ownership interests as part of the general application requirement adopted in this *Third Report and Order*,[504] and under the proposed controlling interest standard would apply the comprehensive affiliation rule to all investors in an applicant. Thus, passive interests that were otherwise non-attributable would be attributed if they are affiliates under this rule. Finally, we note that the Commission reserves the right to conduct random audits of auction applicants and licensees in order to verify information provided regarding eligibility for small business provisions.[505] We seek

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[502] We note, however, that in seeking comment regarding the auction of initial licenses for certain broadcast stations, the Commission has proposed stricter attribution standards and eligibility requirements for applicants seeking to qualify for minority-based provisions. *See* Broadcast NPRM at p 18.

[503] *See* 47 C.F.R. § 24.709(b)(7).

[504] *See* Section III.C.3, *infra*.

[505] *See* Section III.C.5, *supra*.

comment on our proposed rule.[506]

B. Payment Issues

1. Default Payments

188. *Background.* Section 1.2104(g) of our rules provides that where a winning bidder defaults on a license the bidder becomes subject to a default payment equal to the difference between the amount bid and the winning bid the next time the license is offered by the Commission (net or gross, whichever is less) plus an additional payment equal to three percent of the subsequent winning bid or the amount bid (net or gross, whichever is less).[507] In the past, where a bidder has defaulted on multiple licenses, this rule has been interpreted to require that the amount of the default payment be determined on a license-by-license basis, and then added together to determine the total default payment assessed.[508]

189. *Discussion.* We seek comment on whether we should modify Section 1.2104(g) to provide that where a winning bidder defaults on multiple licenses the default payment will be determined based upon the aggregate winning bid and the aggregate winning bid the next time the licenses are offered by the Commission. We recognize that assessing default payments

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[506] *See* Appendix E.

[507] *See* 47 C.F.R.§ 1.2104(g)(2).

[508] *See* BDPCS, Inc., BTA Nos. B008, B036, B055, B089, B110, B133, B149, B261, B298, B331, B347, B358, B391, B395, B407, B413, and B447, Order, 11 FCC Rcd 14399 (WTB) (1996) (assessing a $67,695,653.23 default payment for failure to submit the required down payment for 18 licenses won in the C block auction), reconsideration denied, Order, 12 FCC Rcd 6606 (WTB) (1997), Application for Review Pending.

through this method could significantly alter the amount of the default payment assessed under our rules. In this regard, we seek comment on whether this system could encourage insincere bidding and defaults since it could greatly reduce the effective penalty for a default. To the extent that a bidder is already intending to default on a license whose price at reauction is anticipated to exceed the initial bid price the effective penalty for defaulting on additional licenses would be limited to three percent of the subsequent winning bid or the amount bid, whichever is lower. Since the potential defaulter would not be facing the full harm caused by the default on the additional license, the incentive for insincere bidding and default could be too great. Indeed, this modification could encourage speculation by encouraging a high bidder on a relatively high valued license who anticipates default to purposely bid and default on a relatively low valued license in order to lessen the default payment assessed under our rules. Finally, we seek comment on whether such a modification could function without nullifying the provision in Section 1.2104(g) discussed above assessing an additional default payment equal to three percent of the subsequent winning bid or the amount bid, whichever is lower.[509]

C. Administrative Filing Periods for Applications and Petitions to Deny

190. *Background.* Previously, the Commission has provided a 30-day period for filing of petitions to deny.[510] A 30-day petition to deny period will be used for the upcoming

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[509] *See* 47 C.F.R.§ 1.2104(g)(2).

[510] *See* 47 C.F.R.§ 1.2108.

paging and LMDS auctions.[511] As discussed above (see Section III.A), in this *Third Report and Order* we amend Section 1.2108 of our rules to conform to the provisions in the Balanced Budget Act regarding the filing period for petitions to deny applications for initial licenses in auctionable services.[512] Specifically, notwithstanding Section 309(b) of the Communications Act,[513] Section 1.2108 as amended will provide that the Commission shall not grant a license less than seven days after public notice that long-form applications have been accepted for filing and that in all cases the period for filing petitions to deny shall be no shorter than five days.[514]

191. *Discussion.* Although we believe that in light of Congress' directive in the Balanced Budget Act a shortened petition to deny period is generally appropriate for future auctions, we seek comment on the appropriate length of a petition to deny period in light of this legislation. For example, we seek comment on whether there are instances in which the Commission should provide for a longer period than the minimums set forth in the statute for the filing of petitions to deny or for the grant of initial licenses in auctionable services (5 days and 7 days, respectively). In particular, we ask commenters to address whether auctions for specific services (e.g., broadcast licenses) require longer periods for the filing of petitions to deny, and why this may be so.

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[511] *See* 47 C.F.R.§ 90.163(a)(4)(Paging); 47 C.F.R.§ 101.43(a)(4)(LMDS).

[512] *See* 47 C.F.R.§ 1.2108. *See also*, Balanced Budget Act,§ 3008.

[513] 47 U.S.C.§ 309(b).

[514] 47 C.F.R.§§ 1.2108(b), (c).

D. Competitive Bidding Rules and Procedures for the Auction of General Wireless Communications Services (GWCS) Licenses

192. *Background.* On July 31, 1995, the Commission adopted the *Second Report and Order* in ET Docket No. 94-32 establishing auction and service rules for the General Wireless Communications Service (GWCS) in the 4660-4685 MHz band.[515] Subsequently, several parties filed petitions for reconsideration of the *Second Report and Order* that remain pending before the Commission.[516] The 1993 Omnibus Budget Reconciliation Act requires that 5 MHz[517] of this spectrum be auctioned and licensed not later than August 9, 1998,[518] and to comply with this deadline, the Commission has announced an auction date for licenses in the GWCS as May 27, 1998.[519]

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[515] *See* Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, ET Docket No. 94-32, Second Report and Order, 11 FCC Rcd 624 (1995) ("GWCS Second Report and Order").

[516] *See* Joint Petition for Reconsideration, Association of American Public Television Stations, et al (April 6, 1995). *See also*, Petition for Reconsideration of Wireless Cable Association International (September 8, 1995); Petition for Clarification and Reconsideration of the Association for Maximum Service Television, Inc. (September 8, 1995).

[517] We note that an additional five megahertz of this spectrum was auctioned as part of the spectrum offered in the WCS auction.

[518] *See* 47 U.S.C. § 309(j)(9). The auction for this service has been delayed pending resolution of potential interference with U.S. operations. *See* Defense Communications, "Federal Frequency Spectrum Sale Could Impair Military Operations," United States General Accounting Office Report to Congressional Committees, June, 1997, and letters included therein.

[519] *See* "FCC Announces Auction Schedule for the General Wireless Communications Service," Public Notice, DA 97-2634 (rel. December 17, 1997).

193. *Discussion*. We tentatively conclude that the Part 1 rules we adopt in the *Third Report and Order* should apply to the auction of GWCS spectrum and specifically supersede the previously-adopted GWCS rules setting forth auction rules and procedures.[520] In this regard, consistent with our decision in the *Third Report and Order*, we note that we would no longer offer installment payments as a means of financing small business participation in the GWCS auction, but instead would offer somewhat higher bidding credits. Employing Part 1 rules for the GWCS auction furthers our goal of simplifying and streamlining all competitive bidding rules and procedures for future auctions. In addition, by applying the Part 1 rules to the GWCS auction, we assure that GWCS auction participants, like participants in other future auctions, benefit from the experience we have gained in the 15 spectrum auctions we have conducted to date. We seek comment on this tentative conclusion.

194. In light of the statutory deadline for the auction and licensing of GWCS spectrum, we also tentatively conclude to use our discretion to truncate the petition to deny period for the grant of licenses in the GWCS auction. We believe that a shortened petition to deny period will assure issuance of the GWCS licenses by Congress' deadline. As discussed above (see Section IV.C), notwithstanding Section 309(d)(1) of the Communications Act, the Balanced Budget Act provides for shortened periods for the filing of petitions to deny and for the grant of licenses.[521] Under this provision, the Commission is permitted to grant any application for authorization assigned

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[520] *See* 47 C.F.R.§§ 26.1 et seq.

[521] Section 3008, Balanced Budget Act of 1997, P.L. 105-33, 111 Stat. 251 (1997).

under competitive bidding not earlier than 7 days following public notice that an application has been accepted for filing, and may specify a period of not less than 5 days for filing petitions to deny.[522] We seek comment on this tentative conclusion.

V. CONCLUSION

195. Based on the experience we have gained from our 15 completed auctions, as well as the feedback we have received from bidders, we believe the time has come to streamline our competitive bidding rules in order to make our licensing process more efficient. In the past, we have adjusted our auction procedures for different services as we gained experience with the process, resulting in the adoption of different procedures for different auctionable services. This *Third Report and Order* amends Subpart Q of Part 1 of the Commission's rules[523] to reflect substantive amendments and modifications intended to simplify these regulations, supersede unnecessary rules wherever possible, and eliminate the need to conduct separate, comprehensive rule making proceedings prior to each auction. We believe that the rules we adopt today will benefit bidders and the auction process generally. We also believe these rules will help to provide more specific guidance and flexibility on a number of issues that will increase the overall effectiveness of our auctions. This Second Further Notice of Proposed Rule Making seeks comment on additional issues relating to our general competitive bidding rules for all auctionable services. We believe that these proposals will further enable us to achieve our goals of simplifying and streamlining our regulations in order to increase the overall

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[522] *Id.*

[523] 47 C.F.R.§§ 1.2101 et seq.

efficiency of the competitive bidding process.

VI. PROCEDURAL MATTERS AND ORDERING CLAUSES

A. Regulatory Flexibility Act

196. The Final Regulatory Flexibility analysis, pursuant to the Regulatory Flexibility Act, 5 U.S.C. Section 604, is contained in Appendix B.

197. With respect to this Second Further Notice of Proposed Rulemaking, an Initial Regulatory Flexibility Analysis is contained in Appendix C. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis of the expected impact on small entities of the proposals suggested in this document. Written public comments are requested on the Initial Regulatory Flexibility Analysis. In order to fulfill the mandate of the Contract with America Advancement Act of 1996 regarding the Final Regulatory Flexibility Analysis we ask a number of questions in our Initial Regulatory Flexibility Analysis regarding the prevalence of small businesses in the industry. Comments on the Initial Regulatory Flexibility Analysis must be filed in accordance with the same filing deadlines as comments on the Second Further Notice of Proposed Rulemaking, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this Second Further Notice of Proposed Rulemaking, including the initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96- 354, 94 Stat. 1164,

5 U.S.C. § 601 *et seq.* (1981).

B. Ex Parte Presentations

198. This Second Further Notice of Proposed Rule Making is a permit but disclose notice and comment rule making proceeding. Ex parte presentations are permitted, provided they are disclosed as provided in Commission rules. See generally 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

C. Comments

199. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before February 6, 1998, and reply comments on or before February 17, 1998. In addition, a courtesy copy should be delivered to Josh Roland and Ken Burnley, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, 2025 M Street, Room 5202, Washington, DC 20554. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus ten copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, DC 20554.

D. Additional Information

200. For further information concerning the *Third Report and Order* and Second Further Notice of Proposed Rule Making, contact Josh Roland or Mark Bollinger, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, Washington, DC 20554, (202) 418- 0660.

E. Ordering Clauses

201. Accordingly, IT IS ORDERED THAT, pursuant to Sections 4(i), 5(b), 5(c)(1), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 155(b), 155(c)(1), 303(r), and 309(j), this *Third Report and Order* and Second Further Notice of Proposed Rule Making is hereby ADOPTED, and Part 1, Subpart Q of the Commission's rules are amended as set forth in Appendix D, effective 60 days after publication in the Federal Register. The information collection contained in these rules becomes effective 60 days after publication in the Federal Register, following OMB approval, unless a notice is published in the Federal Register stating otherwise.

202. IT IS FURTHER ORDERED THAT pursuant to 47 U.S.C.§155(c) and 47 C.F.R. ss 0.131(c) and 0.331, the Chief of the Wireless Telecommunications Bureau IS GRANTED DELEGATED AUTHORITY to prescribe and set forth procedures as set forth herein, including the authority to seek comment on and set forth mechanisms relating to the day-to-day conduct of specific auctions.

203. IT IS FURTHER ORDERED THAT the Secretary shall send a copy of this *Third Report and Order* and Further

Notice of Proposed Rule Making, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with Section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. ss 601 *et seq.*

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A
List of Parties

I. Comments in Response to the Order, Memorandum Opinion and Order, and Notice of Proposed Rule Making

Parties Filing Comments

Airadigm Communications, Inc., Loli, Inc., New Wave Communications, Inc., KMC
Interactive TV, Inc., MAR IVDS, Inc., New Wave PCS, Inc. and Euphemia Banas
("Airadigm")
AirTouch Paging, Inc. ("AirTouch")
Alarm Industry Communications Committee ("AICC")
American Automobile Association ("AAA")
American Mobile Telecommunications Association, Inc. (AMTA)
AT&T Wireless Services, Inc. ("AT&T")
Automated Credit Exchange ("ACE")
Cellular Telecommunications Industry Association ("CTIA")
Compu-DAWN, Inc. ("Compu-DAWN")
Cook Inlet Region, Inc. ("CIRI")
Coalition of Institutional Investors: Fleet Equity Partners, Media/Communications Partners,
OneLiberty Ventures and Spectrum Equity Associates ("CII")
Hughes Electronic Corporation ("Hughes")
Interactive Video Data Trade Association ("ISTA")
Merlin Telecom, Inc. ("Merlin")
Metrocall, Inc. ("Metrocall")
Motorola, Inc. ("Motorola")
Mountain Solutions, Ltd. ("Mountain Solutions")
National Telephone Cooperative Association ("NTCA")

Nextel Communications, Inc. ("Nextel")
Paging Network, Inc. ("PageNet")
Personal Communications Industry Association ("PCIA")
Pocket Communications, Inc. ("Pocket")
Western Wireless Corporation ("WWC")

Parties Filing Reply Comments

Airadigm Communications, Inc., Loli, Inc., New Wave Communications, Inc., KMC
Interactive TV, Inc., MAR IVDS, Inc., New Wave PCS, Inc., and Euphemia Banas
("Airadigm")
AirTouch Paging, Inc. ("AirTouch")
Alarm Industry Communications Committee ("AICC")
American Automobile Association ("AAA")
CellNet Data Systems, Inc. ("CellNet")
Cook Inlet Region, Inc. ("CIRI")
Ericsson, Inc. ("Ericsson")
U.S. Federal Trade Commission, Bureau of Consumer Protection ("FTC")
General Wireless, Inc. ("GWI")
Interactive Video Data Trade Association ("ISTA")
IVDS Enterprises, Joint Venture ("IVDS Enterprises")
Merlin Telecom, Inc. ("Merlin")
Mountain Solutions, Ltd. ("Mountain Solutions")
Narrowband PCS Companies ("NPCS")
Nextel Communications, Inc. ("Nextel")
NextWave Telecom, Inc. ("NextWave")
Omnipoint Corporation ("Omnipoint")
The Rural Telecommunications Group ("RTG")
Western Wireless Corporation ("WWC")

II. Comments in Response to the Public Notice, "Wireless Telecommunications Bureau Seeks Comment on Broadband PCS C and F Block Installment Payment Issues," WT Docket 97-82, DA 97-697 (rel. June 2, 1997)

Parties Filing Comments

Airadigm Communications, Inc. (Airadigm)
ALLTEL Communications, Inc. (ALLTEL)
Alpine PCS, Inc. (Alpine)
AmeriCall International, L.L.C. (AmeriCall)
Bay Springs Telephone Company, Inc. (Bay Springs)
Bear Stearns
BellSouth Corporation
BIA Capital Corporation (BIA Capital)
Brookings Municipal Utilities (BMU)
Central Wireless Partnership (CWP)
Chase Telecommunications, Inc. (Chase)
ClearComm, L.P.
Comcast Corporation
Community Service Communications, Inc. (CSCI)
ComScape Telecommunications of Charleston License, Inc. (ComScape)
Conestoga Wireless Company (Conestoga)
CONXUS Communications, Inc. (CONXUS)
Cook Inlet Region, Inc., Cook Inlet Western Wireless, PV/SS PCS, L.P., Western Wireless
Corporation AirGate Wireless, L.L.C., Aerial Communications, Inc., TeleCorp, Inc., and
Airadigm Communications, Inc. (collectively, CIRI)
Creative Airtime Services, L.L.C. (Creative)
Cyber Sites, L.L.C.
Dewey Ballantine

DiGiPH PCS, Inc. (DiGiPH)
Duluth PCS, Inc., St. Joseph PCS, Inc., and West Virginia PCS, Inc. (collectively, Duluth PCS)
Eldorado Communications, L.L.C. (Eldorado)
Fortunet Communications, L.P. (Fortunet)
General Wireless Inc. (GWI)
Holland Wireless, L.L.C., Wireless 2000, Inc., and Northern Michigan PCS Consortium, (collectively, Holland)
Horizon Personal Communications, Inc. (Horizon)
Indus, Inc.
Integrated Communications Group (Integrated)
Kansas Personal Communications Services, Ltd. (KPCS)
Ken W. Bray
Magnacom Wireless, L.L.C., PCSouth, Inc., and Communications Venture PCS Limited Partnership (collectively, Magnacom)
MCI Communications Corporation (MCI)
Meretel Communications Limited Partnership (Meretel)
MFRI, Inc.
Morris Communications, Inc. (Morris)
National Wireless Resellers Association (NWRA)
National Association of Black-Owned Broadcasters, Inc. (NABOB)
National Association of Black Telecommunications Professionals, Inc. (NABTP)
National Telephone Cooperative Association (NTCA)
Nextel Communications, Inc. (Nextel)
NextWave Telecom, Inc. (NextWave)
Northcoast Communications, L.L.C. (Northcoast)
Official Committee of Unsecured Creditors of Pocket Communications, Inc. (Pocket Creditors)
Omnipoint Corporation
OneStop Wireless
OnQue Communications, Inc. (OnQue)

PCS Plus L.L.C. and McKenzie Telecommunications Group, Inc. (collectively, PCS Plus)
Pioneer Telephone Association, Inc. (Pioneer)
Pocket Communications, Inc. (Pocket)
Point Enterprises, Inc. (Point)
R&S PCS, Inc. (R&S)
RFW, Inc.
Rural Telephone Finance Corporation (RTFC)
Small Business Coalition (SBC)
SouthEast Telephone Limited Partnership, Ltd. (SouthEast Telephone)
Southwestern Bell Mobile Systems (SBMS)
Spectrum Watch
Sprint Spectrum L.P.
Sprint Corporation
Tennessee L.P. 121 (Tennessee)
Toronto Dominion Bank and Toronto Dominion Securities (collectively, Toronto Dominion)
Urban Communicators PCS Limited Partnership (Urban Comm)

Parties Filing Reply Comments

Airtel Communications, Inc. (Airtel)
ALLTEL
Alpine
American Mobile Telecommunications Association, Inc. (AMTA)
Antigone Communications Limited Partnership and PCS Devco, Inc. (collectively, Antigone/Devco)
BellSouth Corporation
Carlson Technologies, Inc. (Carlson)
Cellexis International, Inc. (Cellexis)
ClearComm, L.P.

Comcast Corporation
Conestoga
CONXUS
CIRI
Duluth PCS
Fortunet
GWI
GTE Service Corporation (GTE)
Ken W. Bray
MCI
Millison Investment Management, Inc. (MIM)
Mountain Solutions LTD, Inc. (Mountain Solutions)
Nextel
NextWave
Northcoast
Omnipoint Corporation
OnQue
PCS Wisconsin, LLC
PrimeCo Personal Communications, L.P. (PrimeCo)
Radiofone PCS, L.L.C. (Radiofone)
R&S
RTFC
Sprint Spectrum L.P.
Stan P. Doyle
Telecommunications Resellers Association (TRA)
UniDial Communications (UniDial)
Urban Comm
U.S. Airwaves, Inc.
Wireless Nation, Inc.

Parties Filing Ex Parte Comments

AirGate Wireless, July 18, 1997
AirGate Wireless, July 22, 1997

AirGate Wireless, September 9, 1997
Alpine, September 17, 1997
Alpine, September 23, 1997
AmeriCall, July 11, 1997
AmeriCall, August 5, 1997
AmeriCall and Hughes Network Systems, Inc., September 16, 1997
AmeriCall, ClearComm, and Chase, September 17, 1997
BIA Capital, August 4, 1997
Chase, August 11, 1997
ClearComm, August 7, 1997
Congressman Rick Boucher, July 25, 1997
Congressman Richard Burr, August 11, 1997
Congressman Thomas Davis, July 30, 1997
Congressman John D. Dingell, September 16, 1997
Congressman Steny H. Hoyer, August 7, 1997
Congresswoman Sue W. Kelly, August 11, 1997
Congressman W.J. "Billy" Tauzin, August 13, 1997
Congressmen W.J. "Billy" Tauzin and Edward J. Markey, September 16, 1997
CONXUS, August 27, 1997
Cook Inlet Communications, August 5, 1997
Cook Inlet Communications, August 15, 1997
Cook Inlet Region, Inc., September 23, 1997
El Dorado, August 13, 1997
GWI, August 4, 1997
GWI, August 15, 1997
GWI, August 18, 1997
Magnacom Wireless, LLC, August 13, 1997
MCI, August 14, 1997
NextWave, June 23, 1997
NextWave, July 29, 1997
NextWave, August 5, 1997
Nokia, September 15, 1997

Nokia, September 16, 1997
Northern Michigan PCS Consortium, L.L.C., August 14, 1997
Omnipoint Corporation, August 18, 1997
Omnipoint Corporation, September 3, 1997
Omnipoint Corporation, September 5, 1997
Omnipoint Corporation, September 23, 1997
R&S, August 11, 1997
Senator Christoper S. Bond, July 14, 1997
Senator Paul D. Coverdell, September 24, 1997
Senator Pete V. Domenici, September 10, 1997
Senators James M. Inhofe, Don Nickles, and Conrad Burns, August 7, 1997
Senator John McCain, August 19, 1997
Senator John McCain, September 18, 1997
Senator Daniel Patrick Moynihan, August 4, 1997
Triumph Capital, August 7, 1997
Triumph Capital, September 23, 1997 ("McCarthy Letter")
Urban Comm, August 21, 1997
Urban Comm, September 17, 1997
U.S. Small Business Administration, September 8, 1997 ("Glover Letter")

III. Comments in Response to the Wireless Telecommunications Bureau's Public Notice, "Comment Requested on 7 Percent Interest Rate Imposed on C Block Installment Payment Plan Notes," DA 97-1152 (rel. June 2, 1997).

Parties Filing Comments

Airadigm Communications, Inc. ("Airadigm")
Comscape Telecommunications of Charleston License, Inc. ("ComScape")
DiGiPH PCS, Inc. ("DiGiPH")

Eldorado Communications, L.L.C., KMtel L.L.C., Mercury PCS L.L.C., and Miccom Associates ("Eldorado")
Fortunet Communication, L.P. ("Fortunet")
Indus, Inc, and Chase Telecommunications, Inc. ("Indus and ChaseTel")
Integrated Communications Group Corporation ("Integrated")
Kansas Personal Communication Services, Inc. ("KPCS")
Vincent D. McBride ("McBride")
Morris Communications, Inc. ("Morris")
National Association of Black-Owned Broadcasters, Inc. ("NABOB")
National Telephone Cooperative Association ("NTCA")
NextWave Telecom, Inc. ("NextWave")
Pinnacle Telecom, L.P. ("Pinnacle")
Pioneer Telephone Association, Inc. ("Pioneer")
Rural Telephone Finance Cooperative ("RTFC")
September 17 Alliance ("Alliance")
Sprint Spectrum, L.P. ("Sprint")
Urban Communicators PCS Limited Partnership ("Urban Comm")
Quantum Communications Group, Inc. ("Quantum")
Wireless 2000, Inc., Northern Michigan PCS Consortium, L.L.C., PCSouth, Inc., and Communications Venture PCS Limited Partnership ("Wireless 2000")

Parties Filing Reply Comments

Omnipoint Corporation ("Omnipoint")
Savannah Independent PCS Corporation, Brookings Municipal Utilities, PVT Wireless Limited Partnership, PCS Plus, L.L.C., Southwestern Minnesota PCS Limited Partnership, Western Minnesota PCS Limited Partnership, North Dakota PCS Limited Partnership, and Horizon Personal Communications, Inc. ("Joint C block Applicants").

* * * APPENDICES B & C OMITTED * * *

APPENDIX D
Final Rules

Parts 1, 21, 24, 27, 90 and 95 of Title 47 of the Code of Federal Regulations are amended to read as follows:

PART 1 - PRACTICE AND PROCEDURE

1. The authority citation for Part 1 continues to read as follows:

Authority: 47 U.S.C. 151, 154, 207, 303 and 309(j), unless otherwise noted.

2. Section 1.2101 is revised to read as follows:

§1.2101 Purpose.

The provisions of this subpart implement Section 309(j) of the Communications Act of 1934, as added by the Omnibus Budget Reconciliation Act of 1993 (Public Law 103-66) and the Balanced Budget Act of 1997 (Public Law 105-33), authorizing the Commission to employ competitive bidding procedures to choose from among two or more mutually exclusive applications for certain initial licenses.

3. Section 1.2102 is amended by revising paragraphs (a) and (b) to read as follows:

§ 1.2102 Eligibility of applications for competitive bidding.

(a) Mutually exclusive initial applications are subject to competitive bidding.

(b) The following types of license applications are not subject to competitive bidding procedures:

(1) Public safety radio services, including private internal radio services used by state and local governments and non-government entities and including emergency road services provided by not-for-profit organizations, that

(i) Are used to protect the safety of life, health, or property; and

(ii) Are not commercially available to the public;

(2) Initial licenses or construction permits for digital television service given to existing terrestrial broadcast licensees to replace their analog television service licenses; or

(3) Noncommercial educational and public broadcast stations described under 47 U.S.C.§397(6).

Note to§1.2102: To determine the rules that apply to competitive bidding, specific service rules should also be consulted.

4. Section 1.2103 is amended by revising paragraph (a) and adding paragraph (d) to read as follows:

§ 1.2103 Competitive bidding design options.

(a) The Commission will choose from one or more of the following types of auction designs for services or classes of services subject to competitive bidding:

(1) Simultaneous multiple-round auctions (using remote or on-site electronic bidding);

(2) Sequential multiple round auctions (using either oral ascending or remote and/or on-site electronic bidding);

(3) Sequential or simultaneous single-round auctions (using either sealed paper or remote and/or on-site electronic bidding); and

(4) Combinatorial (package/contingent) bidding auctions.

*****

(d) The Commission may use real time bidding in all electronic auction designs.

5. Section 1.2104 is amended by revising paragraphs (d) and (g) to read as follows:

§ 1.2104 Competitive bidding mechanisms.

*****

(d) *Minimum Bid Increments, Minimum Opening Bids and Maximum Bid Increments*. The Commission may, by announcement before or during an auction, require minimum bid increments in dollar or percentage terms. The Commission also may establish minimum opening bids and maximum bid increments on a service-specific basis.

*****

(g) *Withdrawal, Default and Disqualification Payment.* As specified below, when the Commission conducts an auction pursuant to§1.2103, the Commission will impose payments on bidders who withdraw high bids during the course of an auction, or who default on payments due after an auction closes or who are disqualified.

(1) Bid withdrawal prior to close of auction. A bidder who withdraws a high bid during the course of an auction is subject to a payment equal to the difference between the amount bid and the amount of the winning bid the next time the license is offered by the Commission. The bid withdrawal payment is either the difference between the net withdrawn bid and the subsequent net winning bid, or the difference between the gross

withdrawn bid and the subsequent gross winning bid, whichever is less. No withdrawal payment is assessed if the subsequent winning bid exceeds the withdrawn bid. This payment amount is deducted from any upfront payments or down payments that the withdrawing bidder has deposited with the Commission.

(2) Default or disqualification after close of auction. If a high bidder defaults or is disqualified after the close of such an auction, the defaulting bidder will be subject to the payment in paragraph (g)(1) plus an additional payment equal to 3 percent of the subsequent winning bid. If the subsequent winning bid exceeds the defaulting bidder's bid amount, the 3 percent payment will be calculated based on the defaulting bidder's bid amount. If either bid amount is subject to a bidding credit, the 3 percent credit will be calculated using the same bid amounts and basis (net or gross bids) as in the calculation of the payment in paragraph (g)(1) of this section. Thus, for example, if gross bids are used to calculate the payment in paragraph (g)(1), the 3 percent will be applied to the gross amount of the subsequent winning bid, or the gross amount of the defaulting bid, whichever is less.

*****

6. Section 1.2105 is revised to read as follows:

§ 1.2105 Bidding application and certification procedures; prohibition of collusion.

(a) Submission of Short-Form Application (FCC Form 175). In order to be eligible to bid, an applicant must timely submit a short-form application (FCC Form 175), together with any appropriate upfront payment set forth by Public Notice. Beginning January 1, 1999, all short-form applications must be

filed electronically.

(1) All short-form applications will be due:

(i) On the date(s) specified by Public Notice; or

(ii) In the case of application filing dates which occur automatically by operation of law (see, e.g., 47 CFR 22.902), on a date specified by Public Notice after the Commission has reviewed the applications that have been filed on those dates and determined that mutual exclusivity exists.

(2) The short-form application must contain the following information:

(i) Identification of each license on which the applicant wishes to bid;

(ii)(A) The applicant's name, if the applicant is an individual. If the applicant is a corporation, then the short-form application will require the name and address of the corporate office and the name and title of an officer or director. If the applicant is a partnership, then the application will require the name, citizenship and address of all general partners, and, if a partner is not a natural person, then the name and title of a responsible person should be included as well. If the applicant is a trust, then the name and address of the trustee will be required. If the applicant is none of the above, then it must identify and describe itself and its principals or other responsible persons; and

(B) Applicant ownership information, as set forth in§1.2112.

(iii) The identity of the person(s) authorized to make or withdraw a bid;

(iv) If the applicant applies as a designated entity pursuant to§1.2110, a statement to that effect and a declaration, under penalty of perjury, that the applicant is qualified as a designated entity under§1.2110.

(v) Certification that the applicant is legally, technically, financially and otherwise qualified pursuant to Section 308(b)

of the Communications Act of 1934, as amended. The Commission will accept applications certifying that a request for waiver or other relief from the requirements of Section 310 is pending;

(vi) Certification that the applicant is in compliance with the foreign ownership provisions of Section 310 of the Communications Act of 1934, as amended;

(vii) Certification that the applicant is and will, during the pendency of its application(s), remain in compliance with any service-specific qualifications applicable to the licenses on which the applicant intends to bid including, but not limited to, financial qualifications. The Commission may require certification in certain services that the applicant will, following grant of a license, come into compliance with certain service-specific rules, including, but not limited to, ownership eligibility limitations;

(viii) An exhibit, certified as truthful under penalty of perjury, identifying all parties with whom the applicant has entered into partnerships, joint ventures, consortia or other agreements, arrangements or understandings of any kind relating to the licenses being auctioned, including any such agreements relating to the post-auction market structure.

(ix) Certification under penalty of perjury that it has not entered and will not enter into any explicit or implicit agreements, arrangements or understandings of any kind with any parties other than those identified pursuant to paragraph (a)(2)(viii) regarding the amount of their bids, bidding strategies or the particular licenses on which they will or will not bid;

Note to paragraph (a): The Commission may also request applicants to submit additional information for informational purposes to aid in its preparation of required reports to Congress.

(b) *Modification and Dismissal of Short-Form Application (FCC Form 175).* (1) Any short-form application (FCC Form 175) that does not contain all of the certifications required pursuant to this section is unacceptable for filing and cannot be corrected subsequent to the applicable filing deadline. The application will be dismissed with prejudice and the upfront payment, if paid, will be returned.

(2) The Commission will provide bidders a limited opportunity to cure defects specified herein (except for failure to sign the application and to make certifications) and to resubmit a corrected application. During the resubmission period for curing defects, a short-form application may be amended or modified to cure defects identified by the Commission or to make minor amendments or modifications. After the resubmission period has ended, a short- form application may be amended or modified to make minor changes or correct minor errors in the application. Major amendments cannot be made to a short- form application after the initial filing deadline. Major amendments include changes in ownership of the applicant that would constitute an assignment or transfer of control, changes in an applicant's size which would affect eligibility for designated entity provisions, and changes in the license service areas identified on the short-form application on which the applicant intends to bid. Minor amendments include, but are not limited to, the correction of typographical errors and other minor defects not identified as major. An application will be considered to be newly filed if it is amended by a major amendment and may not be resubmitted after applicable filing deadlines.

(3) Applicants who fail to correct defects in their applications in a timely manner as specified by Public Notice will have their applications dismissed with no opportunity for resubmission.

(c) *Prohibition of collusion.* (1) Except as provided in paragraphs (c)(2), (c)(3) and (c)(4) of this section, after the filing of short-form applications, all applicants are prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies, or discussing or negotiating settlement agreements, with other applicants until after the high bidder makes the required down payment, unless such applicants are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application pursuant to§1.2105(a)(2)(viii).

(2) Applicants may modify their short-form applications to reflect formation of consortia or changes in ownership at any time before of during an auction, provided such changes do no result in a change in control of the applicant, and provided that the parties forming consortia or entering into ownership agreements have not applied for licenses in any of the same geographic license areas. Such changes will not be considered major modifications of the application.

(3) After the filing of short-form applications, applicants may make agreements to bid jointly for licenses, provided the parties to the agreement have not applied for licenses in any of the same geographic license areas.

(4) After the filing of short-form applications, a holder of a non- controlling attributable interest in an entity submitting a short-form application may acquire an ownership interest in, form a consortium with, or enter into a joint bidding arrangement with, other applicants for licenses in the same geographic license area, provided that:

(i) the attributable interest holder certifies to the Commission that it has not communicated and will not communicate with any party concerning the bids or bidding strategies of more than one of the applicants in which it holds an attributable interest, or with which it has a consortium or joint bidding arrangement, and which have applied for licenses

in the same geographic license area(s); and

(ii) The arrangements do not result in any change in control of an applicant; or

(iii) When an applicant has withdrawn from the auction, is no longer placing bids and has no further eligibility, a holder of a non-controlling, attributable interest in such an applicant may obtain an ownership interest in or enter into a consortium with another applicant for a license in the same geographic service area, provided that the attributable interest holder certifies to the Commission that it did not communicate with the new applicant prior to the date that the original applicant withdrew from the auction.

(5) Applicants must modify their short-form applications to reflect any changes in ownership or in membership of consortia or joint bidding arrangements.

(6) For purposes of this paragraph:

(i) The term "applicant" shall include all controlling interests in the entity submitting a short-form application to participate in an auction (FCC Form 175), as well as all holders of partnership and other ownership interests and any stock interest amounting to 10 percent or more of the entity, or outstanding stock, or outstanding voting stock of the entity submitting a short-form application, and all officers and directors of that entity; and

(ii) the term "bids or bidding strategies" shall include capital calls or requests for additional funds in support of bids or bidding strategies.

EXAMPLE: Company A is an applicant in area 1. Company B and Company C each own 10 percent of Company A. Company D is an applicant in area 1, area 2, and area 3. Company C is an applicant in area 3. Without violating the Commission's Rules, Company B can enter into a consortium arrangement with Company D or acquire an ownership interest

in Company D if Company B certifies either (1) that it has communicated with and will communicate neither with Company A or anyone else concerning Company A's bids or bidding strategy, nor with Company C or anyone else concerning Company C's bids or bidding strategy, or (2) that it has not communicated with and will not communicate with Company D or anyone else concerning Company D's bids or bidding strategy.

7. Section 1.2107 is amended by revising paragraphs (b) and (c) to read as follows:

§ 1.2107 Submission of down payment and filing of long-form applications.

*****

(b) Unless otherwise specified by Public Notice, within ten (10) business days after being notified that it is a high bidder on a particular license(s), a high bidder must submit to the Commission's lockbox bank such additional funds (the "down payment") as are necessary to bring its total deposits (not including upfront payments applied to satisfy bid withdrawal or default payments) up to twenty (20) percent of its high bid(s). (In single round sealed bid auctions conducted under§1.2103, however, bidders may be required to submit their down payments with their bids.) Unless otherwise specified by Public Notice, this down payment must be made by wire transfer in U.S. dollars from a financial institution whose deposits are insured by the Federal Deposit Insurance Corporation and must be made payable to the Federal Communications Commission. Down payments will be held by the Commission until the high bidder has been awarded the license and has paid the remaining balance due on the license

or authorization, in which case it will not be returned, or until the winning bidder is found unqualified to be a licensee or has defaulted, in which case it will be returned, less applicable payments. No interest on any down payment will be paid to the bidders.

(c) A high bidder that meets its down payment obligations in a timely manner must, within ten (10) business days after being notified that it is a high bidder, submit an additional application (the "long-form application") pursuant to the rules governing the service in which the applicant is the high bidder. Notwithstanding any other provision in title 47 of the Code of Federal Regulations to the contrary, high bidders need not submit an additional application filing fee with their long-form applications. Specific procedures for filing applications will be set out by Public Notice. Beginning January 1, 1999, all long-form applications must be filed electronically. An applicant that fails to submit the required long-form application under this paragraph and fails to establish good cause for any late-filed submission, shall be deemed to have defaulted and will be subject to the payments set forth in§1.2104.

*****

8. Section 1.2108 is amended by revising paragraphs (b) and (c) to read as follows:

§ 1.2108 Procedures for filing petitions to deny against long-form applications.

*****

(b) Within a period specified by Public Notice, and after the Commission by public notice announces that long-form applications have been accepted for filing, petitions to deny

such applications may be filed. In all cases, the period for filing petitions to deny shall be no shorter than five (5) days. Any such petitions must contain allegations of fact supported by affidavit of a person or persons with personal knowledge thereof.

(c) An applicant may file an opposition to any petition to deny, and the petitioner a reply to such opposition. Allegations of fact or denials thereof must be supported by affidavit of a person or persons with personal knowledge thereof. The time for filing such oppositions shall be at least five (5) days from the filing date for petitions to deny, and the time for filing replies shall be at least five (5) days from the filing date for oppositions. The Commission may grant a license based on any long-form application that has been accepted for filing. The Commission shall in no case grant licenses earlier than seven (7) days following issuance of a public notice announcing long-form applications have been accepted for filing.

*****

9. Section 1.2109 is amended by revising paragraphs (a), (b) and (c) to read as follows:

§ 1.2109 License grant, denial, default, and disqualification.

(a) Unless otherwise specified by Public Notice, auction winners are required to pay the balance of their winning bids in a lump sum within ten (10) business days following the release of a Public Notice establishing the payment deadline. If a winning bidder fails to pay the balance of its winning bids in a lump sum by the applicable deadline as specified by the Commission, it will be allowed to make payment within ten (10) business days after the payment deadline, provided that it also pays a late fee equal to five percent of the amount due.

When a winning bidder fails to pay the balance of its winning bid by the late payment deadline, it is considered to be in default on its license(s) and subject to the applicable default payments. Licenses will be awarded upon the full and timely payment of winning bids and any applicable late fees.

(b) If a winning bidder withdraws its bid after the Commission has declared competitive bidding closed or fails to remit the required down payment within ten (10) business days after the Commission has declared competitive bidding closed, the bidder will be deemed to have defaulted, its application will be dismissed, and it will be liable for the default payment specified in§1.2104(g)(2). In such event, the Commission, at its discretion, may either re- auction the license to existing or new applicants or offer it to the other highest bidders (in descending order) at their final bids. The down payment obligations set forth in§1.2107(b) will apply.

(c) A winning bidder who is found unqualified to be a licensee, fails to remit the balance of its winning bid in a timely manner, or defaults or is disqualified for any reason after having made the required down payment, will be deemed to have defaulted and will be liable for the payment set forth in§1.2104(g)(2). In such event, the Commission may either re-auction the license to existing or new applicants or offer it to the other highest bidders (in descending order) at their final bids.

*****

10. Section 1.2110 is revised to read as follows:

§ 1.2110 Designated entities.

*****

(b) ***

(3) Rural telephone companies. A rural telephone company is

any local exchange carrier operating entity to the extent that such entity --

(i) provides common carrier service to any local exchange carrier study area that does not include either

(A) any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census, or

(B) any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993;

(ii) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines;

(iii) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or

(iv) has less than 15 percent of its access lines in communities of more than 50,000 on the date of enactment of the Telecommunications Act of 1996.

(4) Affiliate.

(i) An individual or entity is an affiliate of an applicant or of a person holding an attributable interest in an applicant if such individual or entity--

(A) directly or indirectly controls or has the power to control the applicant, or

(B) is directly or indirectly controlled by the applicant, or

(C) is directly or indirectly controlled by a third party or parties that also controls or has the power to control the applicant, or

(D) has an "identity of interest" with the applicant.

(ii) Nature of control in determining affiliation.

(A) Every business concern is considered to have one or more parties who directly or indirectly control or have the power to control it. Control may be affirmative or negative and it is immaterial whether it is exercised so long as the power to

control exists.

Example. An applicant owning 50 percent of the voting stock of another concern would have negative power to control such concern since such party can block any action of the other stockholders. Also, the bylaws of a corporation may permit a stockholder with less than 50 percent of the voting stock to block any actions taken by the other stockholders in the other entity. Affiliation exists when the applicant has the power to control a concern while at the same time another person, or persons, are in control of the concern at the will of the party or parties with the power to control.

(B) Control can arise through stock ownership; occupancy of director, officer or key employee positions; contractual or other business relations; or combinations of these and other factors. A key employee is an employee who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern.

(C) Control can arise through management positions where a concern's voting stock is so widely distributed that no effective control can be established.

Example. In a corporation where the officers and directors own various size blocks of stock totaling 40 percent of the corporation's voting stock, but no officer or director has a block sufficient to give him or her control or the power to control and the remaining 60 percent is widely distributed with no individual stockholder having a stock interest greater than 10 percent, management has the power to control. If persons with such management control of the other entity are persons with attributable interests in the applicant, the other entity will be deemed an affiliate of the applicant.

(iii) Identity of interest between and among persons. Affiliation can arise between or among two or more persons with an identity of interest, such as members of the same family or persons with common investments. In determining if the applicant controls or has the power to control a concern, persons with an identity of interest will be treated as though they were one person.

Example. Two shareholders in Corporation Y each have attributable interests in the same PCS application. While neither shareholder has enough shares to individually control Corporation Y, together they have the power to control Corporation Y. The two shareholders with these common investments (or identity in interest) are treated as though they are one person and Corporation Y would be deemed an affiliate of the applicant.

(A) Spousal Affiliation. Both spouses are deemed to own or control or have the power to control interests owned or controlled by either of them, unless they are subject to a legal separation recognized by a court of competent jurisdiction in the United States. In calculating their net worth, investors who are legally separated must include their share of interests in property held jointly with a spouse.

(B) Kinship Affiliation. Immediate family members will be presumed to own or control or have the power to control interests owned or controlled by other immediate family members. In this context "immediate family member" means father, mother, husband, wife, son, daughter, brother, sister, father- or mother-in-law, son- or daughter-in-law, brother- or sister-in-law, step- father or -mother, step-brother or -sister, step-son or -daughter, half brother or sister. This presumption may be rebutted by showing that the family members are estranged, the family ties are remote, or the family members are

not closely involved with each other in business matters.

Example. A owns a controlling interest in Corporation X. A's sister-in-law, B, has an attributable interest in a PCS application. Because A and B have a presumptive kinship affiliation, A's interest in Corporation Y is attributable to B, and thus to the applicant, unless B rebuts the presumption with the necessary showing.

(iv) Affiliation through stock ownership.

(A) An applicant is presumed to control or have the power to control a concern if he or she owns or controls or has the power to control 50 percent or more of its voting stock.

(B) An applicant is presumed to control or have the power to control a concern even though he or she owns, controls or has the power to control less than 50 percent of the concern's voting stock, if the block of stock he or she owns, controls or has the power to control is large as compared with any other outstanding block of stock.

(C) If two or more persons each owns, controls or has the power to control less than 50 percent of the voting stock of a concern, such minority holdings are equal or approximately equal in size, and the aggregate of these minority holdings is large as compared with any other stock holding, the presumption arises that each one of these persons individually controls or has the power to control the concern; however, such presumption may be rebutted by a showing that such control or power to control, in fact, does not exist.

(v) Affiliation arising under stock options, convertible debentures, and agreements to merge. Stock options, convertible debentures, and agreements to merge (including agreements in principle) are generally considered to have a present effect on the power to control the concern. Therefore, in making a size determination, such options, debentures, and

agreements are generally treated as though the rights held thereunder had been exercised. However, an affiliate cannot use such options and debentures to appear to terminate its control over another concern before it actually does so.

Example 1. If company B holds an option to purchase a controlling interest in company A, who holds an attributable interest in a PCS application, the situation is treated as though company B had exercised its rights and had come owner of a controlling interest in company A. The gross revenues of company B must be taken into account in determining the size of the applicant.

Example 2. If a large company, BigCo, holds 70% (70 of 100 outstanding shares) of the voting stock of company A, who holds an attributable interest in a PCS application, and gives a third party, SmallCo, an option to purchase 50 of the 70 shares owned by BigCo, BigCo will be deemed to be an affiliate of company A, and thus the applicant, until SmallCo actually exercises its option to purchase such shares. In order to prevent BigCo from circumventing the intent of the rule which requires such options to be considered on a fully diluted basis, the option is not considered to have present effect in this case.

Example 3. If company A has entered into an agreement to merge with company B in the future, the situation is treated as though the merger has taken place.

(vi) Affiliation under voting trusts.

(A) Stock interests held in trust shall be deemed controlled by any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will.

(B) If a trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary, the stock interests held in trust will be deemed controlled by the grantor or beneficiary, as appropriate.

(C) If the primary purpose of a voting trust, or similar agreement, is to separate voting power from beneficial ownership of voting stock for the purpose of shifting control of or the power to control a concern in order that such concern or another concern may meet the Commission's size standards, such voting trust shall not be considered valid for this purpose regardless of whether it is or is not recognized within the appropriate jurisdiction.

(vii) Affiliation through common management. Affiliation generally arises where officers, directors, or key employees serve as the majority or otherwise as the controlling element of the board of directors and/or the management of another entity.

(viii) Affiliation through common facilities. Affiliation generally arises where one concern shares office space and/or employees and/or other facilities with another concern, particularly where such concerns are in the same or related industry or field of operations, or where such concerns were formerly affiliated, and through these sharing arrangements one concern has control, or potential control, of the other concern.

(ix) Affiliation through contractual relationships. Affiliation generally arises where one concern is dependent upon another concern for contracts and business to such a degree that one concern has control, or potential control, of the other concern.

(x) Affiliation under joint venture arrangements.

(A) A joint venture for size determination purposes is an association of concerns and/or individuals, with interests in any degree or proportion, formed by contract, express or implied, to engage in and carry out a single, specific business venture for joint profit for which purpose they combine their efforts,

property, money, skill and knowledge, but not on a continuing or permanent basis for conducting business generally. The determination whether an entity is a joint venture is based upon the facts of the business operation, regardless of how the business operation may be designated by the parties involved. An agreement to share profits/losses proportionate to each party's contribution to the business operation is a significant factor in determining whether the business operation is a point venture.

(B) The parties to a joint venture are considered to be affiliated with each other. Nothing in this subsection shall be construed to define a small business consortium, for purposes of determining status as a designated entity, as a joint venture under attribution standards provided in this section.

(xi) Exclusion from affiliation coverage. For purposes of this section, Indian tribes or Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. s1601 *et seq.*), or entities owned and controlled by such tribes or corporations, are not considered affiliates of an applicant (or licensee) that is owned and controlled by such tribes, corporations or entities, and that otherwise complies with the requirements of this section, except that gross revenues derived from gaming activities conducted by affiliate entities pursuant to the Indian Gaming Regulatory Act (25 U.S.C. s2701 *et seq.*) will be counted in determining such applicant's (or licensee's) compliance with the financial requirements of this section, unless such applicant establishes that it will not receive a substantial unfair competitive advantage because significant legal constraints restrict the applicant's ability to access such gross revenues.

(c) The Commission may set aside specific licenses for which only eligible designated entities, as specified by the Commission, may bid.

(d) The Commission may permit partitioning of service

areas in particular services for eligible designated entities.

(e) Bidding credits.

(1) The Commission may award bidding credits (i.e., payment discounts) to eligible designated entities. Competitive bidding rules applicable to individual services will specify the designated entities eligible for bidding credits, the licenses for which bidding credits are available, the amounts of bidding credits and other procedures.

(2) Size of bidding credits. A winning bidder that qualifies as a small business or a consortium of small businesses may use the following bidding credits corresponding to their respective average gross revenues for the preceding 3 years:

(i) Businesses with average gross revenues for the preceding years 3 years not exceeding $3 million are eligible for bidding credits of 35 percent;

(ii) Businesses with average gross revenues for the preceding years 3 years not exceeding $15 million are eligible for bidding credits of 25 percent; and

(iii) Businesses with average gross revenues for the preceding years 3 years not exceeding $40 million are eligible for bidding credits of 15 percent.

(f) Installment payments. The Commission may permit small businesses (including small businesses owned by women, minorities, or rural telephone companies that qualify as small businesses) and other entities determined to be eligible on a service-specific basis, which are high bidders for licenses specified by the Commission, to pay the full amount of their high bids in installments over the term of their licenses pursuant to the following:

(1) Unless otherwise specified by Public Notice, each eligible applicant paying for its license(s) on an installment basis must deposit by wire transfer in the manner specified in§1.2107(b) sufficient additional funds as are necessary to bring its total deposits to ten (10) percent of its winning bid(s)

within ten (10) days after the Commission has declared it the winning bidder and closed the bidding. Failure to remit the required payment will make the bidder liable to pay a default payment pursuant to§1.2104(g)(2).

(2) Within ten (10) days of the conditional grant of the license application of a winning bidder eligible for installment payments, the licensee shall pay another ten (10) percent of the high bid, thereby commencing the eligible licensee's installment payment plan. Failure to remit the required payment will make the bidder liable to pay default payments pursuant to§1.2104(g)(2).

(3) Upon grant of the license, the Commission will notify each eligible licensee of the terms of its installment payment plan and that it must execute a promissory note and security agreement as a condition of the installment payment plan. Unless other terms are specified in the rules of particular services, such plans will:

(i) impose interest based on the rate of U.S. Treasury obligations (with maturities closest to the duration of the license term) at the time of licensing;

(ii) allow installment payments for the full license term;

(iii) begin with interest-only payments for the first two years; and

(iv) amortize principal and interest over the remaining term of the license.

(4) A license granted to an eligible entity that elects installment payments shall be conditioned upon the full and timely performance of the licensee's payment obligations under the installment plan.

(i) Any licensee that fails to submit payment on an installment obligation will automatically have an additional ninety (90) days in which to submit its required payment without being considered delinquent. Any licensee making its required payment during this period will be assessed a late

payment fee equal to five percent (5%) of the amount of the past due payment. Late fees assessed under this paragraph will accrue on the next business day following the payment due date. Payments made at the close of any grace period will first be applied to satisfy any lender advances as required under each licensee's "Note and Security Agreement." Afterwards, payments will be applied in the following order: late charges, interest charges, principal payments.

(ii) If any licensee fails to make the required payment at the close of the 90-day period set forth in subsection (i) above, the licensee will automatically be provided with a subsequent 90-day grace period. Any licensee making a required payment during this subsequent period will be assessed a late payment fee equal to ten percent (10%) of the amount of the past due payment. Licensees shall not be required to submit any form of request in order to take advantage of the initial 90-day non-delinquency period and subsequent automatic 90-day grace period. All licensees that avail themselves of the automatic grace period must pay the required late fee(s), all interest accrued during the non-delinquency and grace periods, and the appropriate scheduled payment with the first payment made following the conclusion of the grace period.

(iii) If an eligible entity making installment payments is more than one hundred and eighty (180) days delinquent in any payment, it shall be in default.

(iv) Any eligible entity that submits an installment payment after the due date but fails to pay any late fee, interest or principal at the close of the 90-day non-delinquency period and subsequent automatic grace period will be declared in default, its license will automatically cancel, and will be subject to debt collection procedures.

(g) The Commission may establish different upfront payment requirements for categories of designated entities in competitive bidding rules of particular auctionable services.

(h) The Commission may offer designated entities a combination of the available preferences or additional preferences.

(i) Designated entities must describe on their long-form applications how they satisfy the requirements for eligibility for designated entity status, and must list and summarize on their long-form applications all agreements that effect designated entity status, such as partnership agreements, shareholder agreements, management agreements and other agreements, including oral agreements, which establish that the designated entity will have both de facto and de jure control of the entity. Such information must be maintained at the licensees' facilities or by their designated agents for the term of the license in order to enable the Commission to audit designated entity eligibility on an ongoing basis.

(j) The Commission may, on a service-specific basis, permit consortia, each member of which individually meets the eligibility requirements, to qualify for any designated entity provisions.

(k) The Commission may, on a service-specific basis, permit publicly-traded companies that are owned by members of minority groups or women to qualify for any designated entity provisions.

(l) Audits.

(1) Applicants and licensees claiming eligibility under this section shall be subject to audits by the Commission, using in-house and contract resources. Selection for audit may be random, on information, or on the basis of other factors.

(2) Consent to such audits is part of the certification included in the short-form application (FCC Form 175). Such consent shall include consent to the audit of the applicant's or licensee's books, documents and other material (including accounting procedures and practices) regardless of form or type, sufficient to confirm that such applicant's or licensee's representations

are, and remain, accurate. Such consent shall include inspection at all reasonable times of the facilities, or parts thereof, engaged in providing and transacting business, or keeping records regarding FCC-licensed service and shall also include consent to the interview of principals, employees, customers and suppliers of the applicant or licensee.

(m) Gross Revenues. Gross revenues shall mean all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (e.g., cost of goods sold), as evidenced by audited financial statements for the relevant number of most recently completed calendar years or, if audited financial statements were not prepared on a calendar-year basis, for the most recently completed fiscal years preceding the filing of the applicant's short-form (FCC Form 175). If an entity was not in existence for all or part of the relevant period, gross revenues shall be evidenced by the audited financial statements of the entity's predecessor-in-interest or, if there is no identifiable predecessor-in-interest, unaudited financial statements certified by the applicant as accurate. When an applicant does not otherwise use audited financial statements, its gross revenues may be certified by its chief financial officer or its equivalent.

11. Section 1.2111 is amended by revising paragraphs (c) and (d) and adding paragraph (e) to read as follows:

§ 1.2111 Assignment or transfer of control: unjust enrichment.

*****

(c) *Unjust Enrichment Payment: installment financing.*

(1) If a licensee that utilizes installment financing under this section seeks to assign or transfer control of its license to an entity not meeting the eligibility standards for installment

payments, the licensee must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of assignment or transfer as a condition of approval.

(2) If a licensee that utilizes installment financing under this section seeks to make any change in ownership structure that would result in the licensee losing eligibility for installment payments, the licensee shall first seek Commission approval and must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of such change as a condition of approval. A licensee's (or other attributable entity's) increased gross revenues or increased total assets due to nonattributable equity investments, debt financing, revenue from operations or other investments, business development or expanded service shall not be considered to result in the licensee losing eligibility for installment payments.

(3) If a licensee seeks to make any change in ownership that would result in the licensee qualifying for a less favorable installment plan under this section, the licensee shall seek Commission approval and must adjust its payment plan to reflect its new eligibility status. A licensee may not switch its payment plan to a more favorable plan.

(d) *Unjust enrichment payment: bidding credits.*

(1) A licensee that utilizes a bidding credit, and that during the initial term seeks to assign or transfer control of a license to an entity that does not meet the eligibility criteria for a bidding credit, will be required to reimburse the U.S. Government for the amount of the bidding credit, plus interest based on the rate for ten year U.S. Treasury obligations applicable on the date the license was granted, as a condition of Commission approval of the assignment or transfer. If, within the initial term of the license, a licensee that utilizes a bidding credit seeks to assign or transfer control of a license to an entity that is eligible for a lower bidding credit, the difference between the bidding credit

obtained by the assigning party and the bidding credit for which the acquiring party would qualify, plus interest based on the rate for ten year U.S. treasury obligations applicable on the date the license is granted, must be paid to the U.S. Government as a condition of Commission approval of the assignment or transfer. If, within the initial term of the license, a licensee that utilizes a bidding credit seeks to make any ownership change that would result in the licensee losing eligibility for a bidding credit (or qualifying for a lower bidding credit), the amount of the bidding credit (or the difference between the bidding credit originally obtained and the bidding credit for which the restructured licensee would qualify), plus interest based on the rate for ten year U.S. treasury obligations applicable on the date the license is granted, must be paid to the U.S. Government as a condition of Commission approval of the assignment or transfer.

(2) Payment Schedule.

(i) The amount of payments made pursuant to paragraph (d)(1) of this section will be reduced over time as follows:

(A) A transfer in the first two years of the license term will result in a forfeiture of 100 percent of the value of the bidding credit (or in the case of very small businesses transferring to small businesses, 100 percent of the difference between the bidding credit received by the former and the bidding credit for which the latter is eligible);

(B) A transfer in year 3 of the license term will result in a forfeiture of 75 percent of the value of the bidding credit;

(C) A transfer in year 4 of the license term will result in a forfeiture of 50 percent of the value of the bidding credit;

(D) A transfer in year 5 of the license term will result in a forfeiture of 25 percent of the value of the bidding credit; and

(E) for a transfer in year 6 or thereafter, there will be no payment.

(ii) These payments will have to be paid to the United States Treasury as a condition of approval of the assignment, transfer, or ownership change.

(e) *Unjust Enrichment: Partitioning and Disaggregation.*

(1) Installment Payments. Licensees making installment payments, that partition their licenses or disaggregate their spectrum to entities not meeting the eligibility standards for installment payments, will be subject to the provisions concerning unjust enrichment as set forth in this section.

(2) Bidding Credits. Licensees that received a bidding credit that partition their licenses or disaggregate their spectrum to entities not meeting the eligibility standards for such a bidding credit, will be subject to the provisions concerning unjust enrichment as set forth in this section.

(3) Apportioning Unjust Enrichment Payments. Unjust enrichment payments for partitioned license areas shall be calculated based upon the ratio of the population of the partitioned license area to the overall population of the license area and by utilizing the most recent census data. Unjust enrichment payments for disaggregated spectrum shall be calculated based upon the ratio of the amount of spectrum disaggregated to the amount of spectrum held by the licensee.

12. Section 1.2112 is added to read as follows:

§ 1.2112 Ownership disclosure requirements for short- and long-form applications.

(a) Each application for a license or authorization or for consent to assign or transfer control of a license or authorization shall disclose fully the real party or parties in interest and must include in an exhibit the following information:

(1) A list of any FCC-regulated business 10 percent or more of whose stock, warrants, options or debt securities are

owned by the applicant or an officer, director, attributable stockholder or key management personnel of the applicant. This list must include a description of each such business's principal business and a description of each such business's relationship to the applicant;

(2) A list of any party holding a 10 percent or greater interest in the applicant, including the specific amount of the interest;

(3) A list of any party holding a 10 percent or greater interest in any entity holding or applying for any FCC-regulated business in which a 10 percent or more interest is held by another party which holds a 10 percent or more interest in the applicant (e.g., If company A owns 10 percent of Company B (the applicant) and 10 percent of Company C then Companies A and C must be listed on Company B's application;

(4) A list of the names, addresses, and citizenship of any party holding 10 percent or more of each class of stock, warrants, options or debt securities together with the amount and percentage held;

(5) A list of the names, addresses, and citizenship of all controlling interests of the applicants, as set forth in§1.2110;

(6) In the case of a general partnerships, the name, address and citizenship of each partner, and the share or interest participation in the partnership;

(7) In the case of a limited partnerships, the name, address and citizenship of each limited partner whose interest in the applicant is equal to or greater than 10 percent (as calculated according to the percentage of equity paid in and the percentage of distribution of profits and losses);

(8) In the case of a limited liability corporation, the name, address and citizenship of each of its members; and

(9) A list of all parties holding indirect ownership interests in the applicant, as determined by successive multiplication of the ownership percentages for each link in the vertical

ownership chain, that equals 10 percent or more of the applicant, except that if the ownership percentage for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated and reported as if it were a 100 percent interest.

(b) In addition to the information required under paragraph (a) of this section, each applicant for a license or authorization claiming status as a small business shall, as an exhibit to its long-form application:

(1) Disclose separately and in the aggregate the gross revenues, computed in accordance with§1.2110, for each of the following: the applicant and its affiliates, the applicant's attributable investors, affiliates of its attributable investors, and, if a consortium of small businesses, the members comprising the consortium;

(2) List and summarize all agreements or instruments (with appropriate references to specific provisions in the text of such agreements and instruments) that support the applicant's eligibility as a small business under the applicable designated entity provisions, including the establishment of de facto and de jure control; such agreements and instruments include articles of incorporation and bylaws, shareholder agreements, voting or other trust agreements, franchise agreements, and any other relevant agreements (including letters of intent), oral or written; and

(3) List and summarize any investor protection agreements, including rights of first refusal, supermajority clauses, options, veto rights, and rights to hire and fire employees and to appoint members to boards of directors or management committees.

13. Section 1.2113 is added to read as follows:

§ 1.2113 Construction prior to grant of application.

Subject to the provisions of this section, applicants for licenses awarded by competitive bidding may construct facilities to provide service prior to grant of their applications, but must not operate such facilities until the FCC grants an authorization. If the conditions stated in this section are not met, applicants must not begin to construct facilities for licenses subject to competitive bidding.

(a) *When applicants may begin construction.* An applicant may begin construction of a facility upon release of the Public Notice listing the post- auction long-form application for that facility as acceptable for filing.

(b) *Notification to stop.* If the FCC for any reason determines that construction should not be started or should be stopped while an application is pending, and so notifies the applicant, orally (followed by written confirmation) or in writing, the applicant must not begin construction or, if construction has begun, must stop construction immediately.

(c) *Assumption of risk.* Applicants that begin construction pursuant to this section before receiving an authorization do so at their own risk and have no recourse against the United States for any losses resulting from:

(1) Applications that are not granted;

(2) Errors or delays in issuing Public Notices;

(3) Having to alter, relocate or dismantle the facility; or

(4) Incurring whatever costs may be necessary to bring the facility into compliance with applicable laws, or FCC rules and orders.

(d) *Conditions.* Except as indicated, all pre-grant construction is subject to the following conditions:

(1) The application does not include a request for a waiver of one or more FCC rules;

(2) For any construction or alteration that would exceed the requirements of §17.7 of this chapter, the licensee has notified the appropriate Regional Office of the Federal Aviation

Administration (FAA Form 7460-1), filed a request for antenna height clearance and obstruction marking and lighting specifications (FCC Form 854) with the FCC, PRB, Support Services Branch, Gettysburg, PA 17325;

(3) The applicant has indicated in the application that the proposed facility would not have a significant environmental effect, in accordance with ss 1.1301 through 1.1319;

(4) Under applicable international agreements and rules in this part, individual coordination of the proposed channel assignment(s) with a foreign administration is not required; and

(5) Any service-specific restrictions not listed herein.

PART 21 - DOMESTIC PUBLIC FIXED RADIO SERVICES

1. The authority citation for Part 21 continues to read as follows:

Authority: Secs. 1, 2, 4, 201-205, 208, 215, 218, 303, 307, 313, 403, 404, 410, 602, 48 Stat. as amended, 1064, 1066, 1070-1073, 1076, 1077, 1080, 1082, 1083, 1087, 1094, 1098, 1102; 47 U.S.C. 151, 154, 201-205, 208, 215, 218, 303, 307, 313, 314, 403, 404, 602; 47 U.S.C. 552, 554, unless otherwise noted.

2. Section 21.959(a)(2) is revised to read as follows:

§ 21.959 Withdrawal, default and disqualification.

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(a) ***

(2) *Default or disqualification after close of auction. See* § 1.2104 (g)(2) of this chapter.

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3. Section 21.960(b)(4) and (d)(1) are revised to read as follows:

§ 21.960 Designated entity provisions for MDS.

*****

(b) ***.

(4) Conditions and obligations. See § 1.2110(f)(4) of this chapter.

*****

(d) ***

(1) Unjust enrichment. See §1.2111 of this chapter.

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PART 24 - PERSONAL COMMUNICATIONS SERVICES

1. The authority citation for Part 24 continues to read as follows:

Authority: 47 U.S.C. Sections 154, 301, 302, 303, and 332, unless otherwise noted.

2. Section 24.304(a)(2) is revised to read as follows:

§ 24.304 Withdrawal, default and disqualification penalties.

(a) ***

(2) *Default or disqualification after close of auction. See* § 1.2104(g)(2) of this chapter.

*****

3. Section 24.309 is amended by revising paragraphs (b) and (f) to read as follows:

§ 24.309 Designated entities

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(b) Designated entities will be eligible for certain special narrowband PCS provisions as follows:

(1) Installment payments.

(i) Small businesses, including small businesses owned by members of minority groups and women, will be eligible to pay the full amount of their winning bids on any regional, MTA or BTA license in installments over the term of the license pursuant to the terms set forth in §1.2110(g) of this chapter.

(ii) Businesses owned by members of minority groups and women that are winning bidders for the regional licenses indicated by an (**) in §24.129 may pay the full amount of their winning bids (less the applicable bidding credit and down payment) in installments with

(A) Interest imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted, plus 2.5 percent;

(B) Interest-only payments for the first two years; and

(C) Principal and interest payments amortized over the remaining eight years of the license.

(2) Bidding Credits. Businesses owned by member of minority groups and women, including small businesses owned by members of minority groups and women, will be eligible for

a twenty-five (25) percent bidding credit when bidding on the following licenses:

(i) The nationwide licenses on Channel 5, Channel 8 and Channel 11; and

(ii) All MTA licenses on Channel 19, Channel 22, Channel 24; and

(iii) All BTA licenses on Channel 26. This bidding credit will reduce by 25 percent the bid price that businesses owned by members of minority groups and women will be required to pay to obtain a license. Businesses owned by women and/or minorities, including small businesses owned by women and/or minorities will be eligible for a forty (40) percent bidding credit when bidding on all regional licenses on Channel 13 and Channel 17. In §24.129, the licenses that will be eligible for 25 percent bidding credits are indicated by an (*); the licenses that will be eligible for 40 percent bidding credits are indicated by an (**).

*****

(f) *Unjust Enrichment.* Designated entities using installment payments, bidding credits or tax certificates to obtain a narrowband PCS license will be subject to the unjust enrichment provisions contained in §1.2111 of this chapter.

4. Section 24.704(a)(2) is revised to read as follows:

§ 24.704 Withdrawal, default and disqualification penalties.

(a) ***

(2) Default or disqualification after close of auction. See §1.2104(g)(2) of this chapter.

*****

5. Section 24.711 is amended by revising paragraph (b) to read as follows:

§ 24.711 Upfront payments, down payments and installment payments for licenses for frequency Blocks C.

*****

(b) Installment Payments. Each eligible licensee of frequency Block C or F may pay the remaining 90 percent of the net auction price for the license in installment payments pursuant to 1.2110(g) of this Chapter and under the following terms:

(1) For an eligible licensee with gross revenues exceeding $75 million (calculated in accordance with §24.709(a)(2) and (b)) in each of the two preceding years (calculated in accordance with §24.720(f)), interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted, plus 3.5 percent; payments shall include both principal and interest amortized over the term of the license.

(2) For an eligible licensee with gross revenues not exceeding $75 million (calculated in accordance with §24.709(a)(2) and (b)) in each of the two preceding years, interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted, plus 2.5 percent; payments shall include interest only for the first year and payments of interest and principal amortized over the remaining nine years of the license term.

(3) For an eligible licensee that qualifies as a Small business or as a consortium of small businesses, interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted, plus

2.5 percent; payments shall include interest only for the first two years and payments of interest and principal amortized over the remaining eight years of the license term.

(4) For an eligible licensee that qualifies as a business owned by members of minority groups and/or women, interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted; payments shall include interest only for the first three years and payments of interest and principal amortized over the remaining seven years of the license term.

(5) For an eligible licensee that qualifies as a small business owned by members of minority groups and/or women or as a consortium of small business owned by members of minority groups and/or women, interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted; payments shall include interest only for the first six years and payments of interest and principal amortized over the remaining four years of the license term.

(c) Unjust Enrichment. See §1.2111 of this chapter.

6. Section 24.712 is amended by revising paragraph (d) to read as follows:

§ 24.712 Bidding credits for licenses for frequency Blocks C.

*****

(d) *Unjust Enrichment*. See §1.2111 of this chapter.

7. Section 24.716 is amended by revising paragraph (c) and (d) to read as follows:

§ 24.716 Upfront payments, down payments, and installment payments for licenses for frequency Block F.

*****

(c) *Late Installment Payments.* See §1.2110(f)(4) of this chapter.

(d) *Unjust Enrichment.* See §1.2111 of this chapter.

8. Section 24.717 is amended by revising paragraph (c) to read as follows:

§ 24.717 Bidding credits for licenses for frequency Block F.

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(c) *Unjust Enrichment.* See §1.2111 of this chapter.

(c) *Unjust Enrichment.* See §1.2111 of this chapter.

PART 27 - WIRELESS COMMUNICATIONS SERVICE

1. The authority citation for Part 27 continues to read as follows:

Authority: 47 U.S.C. Sections 154, 301, 302, 303, 307, 309 and 332, unless otherwise noted.

2. Section 27.203 is amended by revising paragraph (b) to read as follows:

§ 27.203 Withdrawal, default and disqualification payments.

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(b) *Default or disqualification after close of auction.* See §1.2104(g)(2) of this chapter.

2. Section 27.209 is amended by revising paragraph (d) to read as follows:

§ 27.209 Designated entities; bidding credits; unjust enrichment.

*****

(d) *Unjust Enrichment.* See §1.2111 of this chapter.

PART 90 - PRIVATE LAND MOBILE RADIO SERVICES

1. The authority citation for Part 90 continues to read as follows:

Authority: Secs. 4, 251-2, 303 309 and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 251-2, 303 309 and 332, unless otherwise noted.

2. Section 90.805(c) is revised to read as follows:

§ 90.805 Withdrawal, default and disqualification payments.

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(c) *Default or disqualification after close of auction. See* §1.2104 (g)(2) of this chapter.

*****

3. Section 90.812 (a) and (b) are revised to read as follows:

§ 90.812 Installment payments for licensees won by small businesses.

(a) *Installment Payments. See* §1.2110(f)(4) of this chapter.

(b) *Unjust Enrichment. See* §1.2111(c) of this chapter.

PART 95 - PERSONAL RADIO SERVICES

1. The authority citation for Part 95 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303.

2. Section 95.816(c)(6) and (e) are amended to read as follows:

§ 95.816 Competitive bidding proceedings.

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(c) ***

(6) Default or disqualification. See §1.2104 (g)(2) of this Chapter.

*****

(e) *Unjust Enrichment*. See §1.2111 of this Chapter.

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APPENDIX E
Proposed Rules

Part 1 of Title 47 of the Code of Federal Regulations is proposed to read as follows:

PART 1 - PRACTICE AND PROCEDURE

1. The authority citation for Part 1 continues to read as follows:

Authority: 47 U.S.C. 151, 154, 207, 303 and 309(j), unless otherwise noted.

2. Section 1.2110 is revised to read as follows:

§ 1.2110 Designated entities.

(a) ***

*****

(b) Eligibility for small business provisions.
(1) *Size Attributio:..* The *gross revenues* of the applicant (or licensee), its *controlling interests* and their *affiliates* shall be attributed to the applicant and considered on a cumulative basis and aggregated for purposes of determining whether the applicant (or licensee) is eligible for status as a small business under this section. Applicants seeking status as a small business under this section must disclose on its short- and long-form applications, separately and in the aggregate, the *gross revenues* of the applicant (or licensee), its *controlling interests* and their *affiliates*.
(2) *Aggregation of Affiliate Interests*. Persons or entities that

hold interest in an applicant (or licensee) that are *affiliates* of each other or have an identify of interests identified in §1.2110(d) will be treated as though they were one person or entity and their ownership interests aggregated for purposes of determining an applicant's (or licensee's) compliance with the requirements of this section.

Example 1. ABC Corp. is owned by individuals, A, B, and C, each having an equal one-third voting interest in ABC Corp. A and B together, with two-thirds of the stock have the power to control ABC Corp. and have an identity of interest. If A & B invest in DE Corp., a broadband PCS applicant for block C, A and B's separate interests in DE Corp. must be aggregated because A and B are to be treated as one person or entity.

Example 2. ABC Corp. has subsidiary BC Corp., of which it holds a controlling 51 percent of the stock. If ABC Corp. and BC Corp., both invest in DE Corp., their separate interests in DE Corp. must be aggregated because ABC Corp. and BC Corp. are affiliates of each other.

(3) *Exceptions.*

(i) Small business consortia. Where an applicant (or licensee) is a *consortium of small businesses,* the *gross revenues* and *total assets* of each small business consortium member shall not be aggregated. Each small business consortium member must constitute a separate and distinct legal entity to qualify.

(ii) Applicants without identifiable controlling interests. Where an applicant (or licensee) cannot identify controlling interests under the standards set forth in this section, the gross revenues of all interest holders in the applicant, and their affiliates, will be attributable.

(c) Definitions.

(1) Small businesses. The Commission will establish the definition of a small business on a service-specific basis, taking into consideration the characteristics and capital requirements of the particular service.

(2) Controlling interest.

(i) For purposes of this section, controlling interest includes individuals or entities with both *de jure* and *de facto* control of the applicant. *De jure* control is greater than 50 percent of the voting stock of a corporation, or in the case of a partnership, the general partner. *De facto* control is determined on a case-by-case basis. An entity must disclose its equity interest and demonstrate at least the following indicia of control to establish that it retains de facto control of the applicant:

(A) the entity constitutes or appoints more than 50 percent of the board of directors or management committee;

(B) the entity has authority to appoint, promote, demote, and fire senior executives that control the day-to-day activities of the licensee; and

(C) the entity plays an integral role in management decisions.

(ii) Calculation of Certain Interests.

(A) Ownership interests shall be calculated on a fully diluted basis; all agreements such as warrants, stock options and convertible debentures will generally be treated as if the rights thereunder already have been fully exercised.

(B) Partnership and other ownership interests and any stock interest equity, or outstanding stock, or outstanding voting stock shall be attributed as specified below.

(C) Stock interests held in trust shall be attributed to any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and, to any person who has the right to revoke the trust at will or to replace

the trustee at will. If the trustee has a familial, personal, or extra-trust business relationship to the grantor or the beneficiary, the grantor or beneficiary, as appropriate, will be attributed with the stock interests held in trust.

(D) Non-voting stock shall be attributed as an interest in the issuing entity if in excess of the amounts set forth in paragraph (d)(2)(ii)(B) of this section.

(E) Limited partnership interests shall be attributed to limited partners and shall be calculated according to both the percentage of equity paid in the percentage of distribution of profits and losses.

(F) Officers and directors of an entity shall be considered to have an attributable interest in the entity. The officers and directors of an entity that controls a licensee or applicant shall be considered to have an attributable interest in the licensee or applicant.

(G) Ownership interests that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that if the ownership percentage for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated as if it were a 100 percent interest.

(H) Any person who manages the operations of an applicant or licensee pursuant to a management agreement shall be considered to have an attributable interest in such applicant or licensee if such person or its affiliate pursuant to paragraph (c)(5) of this subsection, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence

(i) The nature or types of services offered by such an applicant or licensee;

(ii) The terms upon which such services are offered; or

(iii) The prices charged for such services.

(I) Any licensee or its affiliate who enters into a joint marketing arrangement with an applicant or licensee, or its affiliate, shall be considered to have an attributable interest, if such applicant or licensee, or its affiliate, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence,

(i) The nature or types of services offered by such an applicant or licensee;

(ii) The terms upon which such services are offered; or

(iii) The prices charged for such services.

(3) Businesses owned by members of minority groups and/or women. Unless otherwise provided in rules governing specific services, a business owned by members of minority groups and/or women is one in which minorities and/or women who are U.S. citizens control the applicant, have at least greater than 50 percent equity ownership and, in the case of a corporate applicant, have a greater than 50 percent voting interest. For applicants that are partnerships, every general partner must be either a minority and/or woman (or minorities and/or women) who are U.S. citizens and who individually or together own at least 50 percent of the partnership equity, or an entity that is 100 percent owned and controlled by minorities and/or women who are U.S. citizens. The interests of minorities and women are to be calculated on a fully diluted basis; agreements such as stock options and convertible debentures shall be considered to have a present effect on the power to control an entity and shall be treated as if the rights thereunder already have been fully exercised. However, upon a demonstration that options or conversion rights held by non- controlling principals will not deprive the minority and female principals of a substantial financial stake in the venture or impair their rights to control the designated entity, a designated entity may seek a waiver of

the requirement that the equity of the minority and female principals must be calculated on a fully-diluted basis. The term minority includes individuals of African American, Hispanic-surnamed, American Eskimo, Aleut, American Indian and Asian American extraction.

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Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding, *Third Report and Order* and Second Further Notice of Proposed Rule Making

STATEMENT OF COMMISSIONER HAROLD W. FURCHTGOTT-ROTH

By today's action, the Commission has consolidated and streamlined its spectrum auction rules. At the same time, and in order to provide existing licensees and future bidders additional regulatory certainty and fairness, the Commission has endeavored to harmonize its auction rules among the various spectrum-based services to which these rules apply. I believe the benefits of these changes will outweigh their costs. Accordingly, I support the item.

We did not, however, undertake the more difficult task of revamping our entire auction system. In my view, this proceeding (the latest round of which began nearly a year ago) should have elicited more thorough public comment on how the system could be improved.

For example, with a more complete record, we could have used this opportunity to permanently discard rules -- such as our ill-fated installment payment system -- that thrust the Commission into the role of unwitting (and unqualified) banker to our licensees. I find it incredibly inefficient and unsound policy for a federal government agency, especially one with no banking expertise, to substitute itself and its judgments for those of private financial institutions and markets.

In the end, however, we have respected the requirements of the law and, where appropriate, we have recognized the critically important role of all designated entities under Section 309(j) of

the Act, including small businesses and rural telephone companies, in our economy and society. I believe that, within the bounds of the law, we must be faithful to companies such as these, just as companies in competitive markets must be faithful to their customers. As regulators, the FCC's fidelity can be measured in part by how little burden we force industry and consumers to shoulder. By adding certainty and fairness to our auction rules, today we have lifted some part of the burden of regulation.

Statement of Commissioner Gloria Tristani on the Adoption the Third Report and Order and Second Further Proposed Rulemaking on the Amendment of the Commission's Part 1 Auction Rules

It is fitting that we streamline, simplify and standardize our auction rules. These rules reduce the burden for applicants and licensees by adopting, where appropriate, uniform rules that will apply regardless of the service to be provided. But we also retain the flexibility to tailor some provisions to individual services. The guidance these rules provide will serve the public and the Commission alike by easing, and speeding, the auctions rulemaking process.

I wish to note a vital issue that remains. Today we affirm our commitment to eliminate barriers to entry and to ensure that minorities and women have the opportunity to participate in the provision of spectrum-based services. Under Section 257, we have already initiated several studies in the broadcast area, and we will soon initiate a study concerning participation and barriers to entry in the auctions context.

To date, minority and women-owned businesses have benefitted from the small business provisions we have offered -- installment payments, bidding credits and entrepreneurs blocks. Thus, of the more than four thousand licenses awarded by auction, approximately 11 percent have been awarded to minority- owned businesses and 11 percent to women -owned businesses. However, in light of our decision today to suspend use of installment payments for the foreseeable future, we must pay attention to the unique obstacles facing minorities and women as they seek to participate in the telecommunications revolution. In the further notice, we seek comment on these

obstacles and on what remedies we might offer to facilitate widespread participation. I will be especially interested in the comments and proposals we receive to fulfill our statutory obligations.

Federal Communications Commission FCC 98-46

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Amendment of Commission's	)	WT Docket No. 97-82
Rules Regarding Installment	)	
Payment Financing For Personal	)	
Communications Services (PCS)	)	
Licensees	)	

ORDER ON RECONSIDERATION OF THE SECOND REPORT AND ORDER

Adopted: March 23, 1998 Released: March 24, 1998

By the Commission: Commissioners Ness and Powell concurring in part, dissenting in part, and issuing separate statements; Commissioner Tristani issuing a statement.

I. INTRODUCTION

1. On September 25, 1997, the Commission adopted a *Second Report and Order* and *Further Notice of Proposed Rule Making* ("*Second Report and Order*" and "*Further Notice*") establishing March 31, 1998, as the deadline for broadband Personal Communications Services ("PCS") C

and F block licensees to resume installment payments.[1] In addition, the Commission offered C block licensees a choice of three alternative payment options in lieu of resuming payments under the terms of the original payment plan. The three options were intended to provide limited relief to C block licensees experiencing financial difficulties, while preserving the fairness and integrity of the auction process.

2. In response to the rulings in the *Second Report and Order*, we received 37 petitions for reconsideration, 17 oppositions to the petitions, 16 replies to the oppositions, and 38 *ex parte* filings.[2] After considering the arguments raised in those filings, we generally affirm the framework established in the *Second Report and Order*, but we make a few modifications designed to provide C block licensees greater flexibility in making their elections. We believe that these changes improve upon the *Second Report and Order* by allowing more existing licensees to adjust their business plans and remain in the wireless market to compete against other providers, while also providing for the return of spectrum to the Commission so that other entrepreneurs will have opportunities to obtain broadband PCS licenses in a reauction. In a forthcoming Order, we will address comments

[1] Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Second Report and Order and Further Notice of Proposed Rule Making*, 12 FCC Rcd 16,436 (1997).

[2] A list of the parties that filed pleadings in response to the *Second Report and Order*, and the abbreviations used to refer to such parties, is attached as Appendix A. Although CX Systems and Dorne & Margolin filed petitions for reconsideration after the filing deadline, we will accept their filings as *ex parte* filings. For the sake of consistency, we refer to filings as oppositions if they were filed at the time oppositions were due, even if they are supportive of arguments raised in the petitions.

filed in response to the *Further Notice*, which covers rules for the reauction of returned C block licenses.

II. BACKGROUND

3. Consistent with Congress' mandate to promote the participation of small businesses and other "designated entities" in the provision of spectrum-based services,[3] the Commission limited eligibility in the initial C block auctions to entrepreneurs and small businesses. The C block auction concluded on May 6, 1996, and the subsequent reauction of defaulted licenses concluded on July 16, 1996, with a total of 90 bidders winning 493 licenses. The winning bidders were permitted to pay 90 percent of their net bid price over a period of ten years, paying only interest for the first six years and paying both interest and principal for the remaining four years.[4]

4. On March 31, 1997, the Wireless Telecommunications Bureau (the "Bureau") suspended the deadline for payment of installment payments for all C block licensees.[5] The suspension was implemented in response to a joint request from several C block licensees seeking modification of their installment payment obligations and to allow more time for discussions with other federal agencies concerning "the transfer of responsibilities for certain debt functions related to

[3] Communications Act of 1934, as amended ("Communications Act") § 309(j)(4)(D), 47 U.S.C. § 309(j)(4)(D).

[4] *See* 47 C.F.R. § 24.711(b)(3). The net bid price is equal to the winning bid less any bidding credit for which the licensee was eligible. *See* 47 C.F.R. § 24.712.

[5] *See* Installment Payments for PCS Licenses, *Order*, 12 FCC Rcd 17,325 (WTB 1997).

[the installment payment] program."[6] On April 28, 1997, the Bureau extended the suspension to F block licensees.[7] As mentioned above, on September 25, 1997, the Commission ended this suspension and established March 31, 1998, as the deadline for C and F block licensees to resume their installment payments.[8]

5. After reviewing various proposals for relief, the Commission decided in the *Second Report and Order* to allow each C block licensee to elect one of three options for all of its licenses in lieu of continuing payments under the licensee's original installment payment plan.[9] Each of the three options -- disaggregation, amnesty, and prepayment -- was intended to provide limited relief to financially troubled licensees without harming the integrity of the auction process.[10] The Commission determined that further relief for F block licensees was unnecessary.[11]

6. In the *Second Report and Order*, the Commission required C block licensees to file a written election notice on or before January 15, 1998, specifying whether they would resume payments under the terms of the original installment payment plan or would proceed under one of the alternative

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[6] *Id.*, 12 FCC Rcd at 17,325 para. 1.

[7] *See* "FCC Announces Grant of Broadband Personal Communications Services D, E, and F Block BTA Licenses," *Public Notice*, DA 97-883 (released April 28, 1997) at 2.

[8] *Second Report and Order*, 12 FCC Rcd at 16,448 para. 21.

[9] *See id.*, 12 FCC Rcd at 16,444-46 paras. 15-17.

[10] *See id.*, 12 FCC Rcd at 16,437-38 para. 2.

[11] *Id.*, 12 FCC Rcd at 16,447 para. 20.

options.[12] On January 7, 1998, we postponed the election date until February 26, 1998, in order to resolve issues raised on reconsideration before licensees submitted their elections.[13] In addition, we announced that the reauction of spectrum surrendered by C block licensees pursuant to their elections would begin on September 29, 1998.[14] On February 24, 1998, we revised both the February 26, 1998, election date and the March 31, 1998, payment resumption date.[15] We changed the election date to 60 days from publication of this Order in the *Federal Register* and the payment resumption date to at least 30 days after the new election date.[16]

III. OVERVIEW

7. The Commission determined in the *Second Report and Order* that it would serve the public interest to provide a variety of relief mechanisms to assist C block licensees that were experiencing difficulties in meeting the financial obligations under the installment payment plan. The Commission believed the "extraordinary procedures" it adopted to offer relief to C block licensees appropriately

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[12] *Id.*, 12 FCC Rcd at 16,470 para. 70.

[13] Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Order*, FCC 98-2 (released January 7, 1998) at para. 2 ("*Election Date Order I*").

[14] *Id.* at para. 3.

[15] Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Order*, FCC 98-28 (released February 24, 1998) ("*Election Date Order II*").

[16] *Id.* at paras. 2-3. The Bureau will issue a public notice setting forth the procedures for filing an election notice.

balanced a number of important policy goals.[17] In formulating a resolution to the complex issues involved, one of the Commission's foremost objectives was to preserve the integrity of the auction process and to maintain public confidence in the stability of the Commission's auction rules.[18] The Commission also believed it was essential to ensure fair and impartial treatment for all auction participants, including winning bidders, unsuccessful bidders, and licensees in competing services.[19] At the same time, the Commission was cognizant of its statutory mandate to promote economic opportunity and to encourage broad participation in the provision of spectrum-based services.[20] In addition, the Commission attempted to implement a workable solution in a timely manner that would facilitate rapid introduction of service to the public without further regulatory or marketplace delay.[21]

8. We believe the approach adopted in the *Second Report and Order* largely accomplishes these objectives. The relief provided C block licensees will speed deployment of service to the public by easing lenders' and investors' concerns regarding regulatory uncertainty and by potentially making more capital available for investment and growth. By

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[17] *Second Report and Order*, 12 FCC Rcd at 16,437-38 para. 2.

[18] *Id.*, 12 FCC Rcd at 16,437-38 paras. 2-3. *But see* MFRI Reply at 2-6 (the real solution to maintaining auction integrity is to resolve bid signaling practices; a modest adjustment to the installment payment plan is not related to auction integrity); Hyundai Reply at 2-3 (auction integrity is not a sufficient basis for denying relief).

[19] *Second Report and Order*, 12 FCC Rcd at 16,437-38 paras. 2-3.

[20] *Id.*, 12 FCC Rcd at 16,437-38 para. 2 (citing Communications Act § 309(j)(3)(A), (B), 47 U.S.C. § 309(j)(3)(A), (B)).

[21] *Id.*, 12 FCC Rcd at 16,437-39 paras. 2, 4-5.

facilitating the provision of service to consumers, the Commission advanced Congress' objective to promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public."[22] In addition, the mechanisms the Commission created to help these small businesses remain viable competitors in the marketplace furthered its statutory mandate to "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses . . . ."[23] However, out of fairness to bidders that withdrew from the auction and to maintain the integrity of the auction process, the Commission rejected proposals that would have significantly altered the amounts paid for individual licenses. Mindful of the effect its decision would have on future auctions, the Commission opted for a more modest approach.

9. Although we believe the decision adopted in the *Second Report and Order* largely should be maintained, we believe that certain aspects of the adopted approach were overly restrictive. A number of petitioners claim that the options presented by the Commission do not provide economically viable alternatives for financially troubled licensees.[24]

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[22] Communications Act § 309(j)(3)(A), 47 U.S.C. § 309(j)(3)(A).

[23] Communications Act § 309(j)(3)(B), 47 U.S.C. § 309(j)(3)(B).

[24] *See, e.g.*, New Wave Petition at 2 (the presented options are not economically viable for numerous licensees and the punitive damages levied will impede network build-out and possibly lead to widespread bankruptcies); GWI Petition at 2 (a major reduction in the license debt is the only commercially viable way for many small businesses to obtain necessary funding); One Stop Wireless Petition at 1 (the options offered do not work

Indeed, a frequent complaint expressed throughout the numerous petitions is that the available options fall short of providing meaningful relief. We also received several letters from members of Congress asking that we take additional measures to assist C block licensees.[25]

10. After reviewing the extensive record on reconsideration, we believe that a radical departure from the *Second Report and Order* is not warranted.[26] The *Second Report and Order*

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for C block licensees); OnQue Petition at 1 (the Commission's options do not provide any stability); Omnipoint Petition at 13 (without further clarification of the Commission's position on bankruptcy, bankruptcy may be a licensee's lowest risk alternative); RFW Reply at 3 (the Commission's punitive provisions likely will increase the number of bankruptcy filings).

[25] The Honorable J. Robert Kerrey *ex parte* filing at 1; The Honorable Barbara Boxer *ex parte* filing at 1-2; The Honorable Albert R. Wynn *ex parte* filing at 1-2; The Honorable Xavier Becerra *ex parte* filing at 1-2; Members of the Congressional Hispanic Caucus *ex parte* filing at 2; The Honorable Richard H. Bryan and The Honorable Harry Reid *ex parte* filing at 1; *see also* The Honorable Sue W. Kelly *ex parte* filing at 1; The Honorable Thomas Daschle *ex parte* filing at 1; The Honorable Gary L. Ackerman *ex parte* filing at 1.

[26] *See* AT&T Opposition at 2 (the options offered in the *Second Report and Order* provide sufficient financial relief without undermining the integrity of the auction process); PrimeCo Opposition at 5 ("the *Second Report and Order* reflects a reasonable balancing of Congress' statutory objectives and marketplace considerations and should be affirmed"); Fidelity Capital Opposition at 5 (the *Second Report and Order* "presents a fair and balanced plan to provide relief to struggling C-Block licensees, while not disadvantaging licensees who are successfully building out their systems"); Northcoast Opposition at 4 (significant change would be fundamentally unfair to licensees that have honored their financial commitments); AirGate Opposition at 5-6 (the financing options available to C block licensees, including the Commission's original installment payment plan, are more generous than financing offered to any participants in other auctions); Frontier Reply at 2 (significant relief would be unfair to bidders that were unsuccessful in the auction process).

created an innovative solution to requests from C block licensees needing financial relief. Certain requirements, however, may constrain many C block licensees from making use of the relief measures offered. We believe that, with a few adjustments to the adopted approach, we can better effectuate the Commission's intent to provide C block licensees a limited measure of relief under the unique but varied circumstances presented. We therefore will leave the basic framework intact, but we will alter it slightly to allow licensees to be more flexible in making their elections for licenses in different geographic areas, to use more of the down payments already on deposit, and to be more flexible in the use of those down payments. We believe that this approach improves upon the *Second Report and Order* by better enabling C block licensees to remain participants in the wireless market, which will promote competition and the delivery of new services to the public.

11. First, we will eliminate the requirement that a licensee must make the same election for all its licenses. Instead, a licensee may make different elections for the different Major Trading Areas ("MTAs") in which it holds licenses. The election made for an MTA will apply to every Basic Trading Area ("BTA") license held by the licensee in that MTA. As under the *Second Report and Order*, the possible elections include resumption of payments, amnesty, prepayment, or disaggregation. As part of the modifications to the adopted approach, we will also permit a combination of disaggregation and prepayment. Resumption of payments and prepayment of 30 MHz licenses will remain essentially the same as in the *Second Report and Order*. We will, however, modify the amnesty and disaggregation options, as follows.

12. Under the revised amnesty option, a licensee may return

to the Commission licenses in any MTA it wishes so long as it returns all its BTA licenses within the MTA. The entire outstanding debt on the returned licenses will be forgiven. For each MTA that is returned, the licensee will have two choices, and its decision will apply to all its BTA licenses within the MTA. If the licensee wishes to bid on those licenses it returns in the reauction, none of the down payment associated with such licenses will be available, consistent with the *Second Report and Order*. Alternatively, the licensee may opt to forgo the opportunity to bid on its returned licenses in exchange for a credit of 70 percent of the down payment made on the licenses. This credit may be used to prepay the entire principal owed for a retained MTA with 30 MHz licenses. This, essentially, is the prepayment option as adopted in the *Second Report and Order*. Alternatively, we permit a combination of prepayment and disaggregation, so that the licensee may prepay the entire principal owed for the retained 15 MHz licenses of an MTA that has been disaggregated.

13. As under the *Second Report and Order*, a licensee that disaggregates an MTA may continue making installment payments on the retained spectrum. However, for each disaggregated license, the licensee will now receive credit for 40 percent of the down payment applicable to the returned 15 MHz of spectrum. This 40 percent credit may be applied only to the 15 MHz of spectrum retained from the same license. It may be used to reduce the principal outstanding and/or to pay "Suspension Interest" (i.e., all unpaid simple interest accruing from the date of license grant through March 31, 1998). Because the down payment applicable to the retained spectrum will be considered the down payment for that spectrum and the licensee thus retains 100 percent of that portion of the down payment, the licensee in effect receives a

blended credit of 70 percent of the total down payment made on the full 30 MHz license.

14. Alternatively, under our modified approach, a licensee will be allowed to prepay a disaggregated MTA. In that case, the licensee will receive credit for 70 percent of the down payment applicable to the returned spectrum. Because the licensee retains 100 percent of the portion of the down payment associated with the retained portion of the license, the licensee in effect receives a blended credit of 85 percent of the total down payment. The 70 percent credit may be applied toward the prepayment of a retained MTA with 30 MHz licenses (so long as the retained 15 MHz license is prepaid) and/or toward the prepayment of the retained 15 MHz licenses of an MTA that has been disaggregated.

15. In addition, we adopt the following limited modifications: (1) we extend to 90 days the 60-day non-delinquency period for payments not made on the payment resumption date, and we impose a 5 percent late payment fee for payments made within this 90-day non-delinquency period; (2) we instruct the Bureau to modify the payment schedules of all C and F block licensees so that all payments will be due on the same date; (3) we eliminate the build-out exception to the amnesty option because it is rendered moot by our modified approach; and (4) for purposes of the rule that a licensee electing prepayment that does not have sufficient funds to prepay all its BTA licenses within an MTA may prepay only the BTA licenses within the MTA that it can afford, we clarify that a licensee can "afford" as many BTA licenses within an MTA that it can prepay using only the amount of credit available to the licensee for prepayment.

IV. MTA-BY-MTA ELECTIONS

A. Background

16. Under the *Second Report and Order*, a licensee was not permitted to make more than one election. Therefore, whatever election was chosen would apply to all licenses held by the licensee. For practical purposes, there was a limited mixing of options to the extent that payments would have to be resumed under the terms of the original installment plan with respect to any licenses not halved under the disaggregation option and any licenses retained under the build-out exception to the amnesty option. Licensees were precluded, however, from forming any other combinations among the options. For example, a licensee could not prepay some licenses and disaggregate others.

B. Discussion

17. By offering a menu of options, the Commission attempted to accommodate the fact that different licensees face different circumstances. However, the requirement that a licensee make the same election for all its licenses failed to account for the situation where a licensee faces different circumstances in its different license areas. We believe that licensees will be able to take better advantage of the varied benefits of the options if they are allowed to make different elections for the different areas in which they hold licenses. Therefore, we eliminate the requirement that a licensee must make the same election for all its licenses. We agree with NextWave and other parties that instead we should allow a licensee to make one election for each MTA in which it holds

licenses.[27] In other words, the same election must be applied to each BTA license held in a given MTA, but different elections may be selected for different MTAs. For this purpose, the available elections that may be applied to an MTA are the resumption of payments under the existing installment payment plan, amnesty, prepayment, disaggregation, and a combination of disaggregation and prepayment. These elections are discussed in detail below.

18. We believe the MTA is the appropriate unit for making an election for similar reasons that the Commission previously determined it was an appropriate cut-off point.[28] We do not believe licensees should be permitted to make elections on a BTA-by-BTA basis. As the Commission stated in the *Second Report and Order*, allowing options to be applied at the BTA level would threaten the interdependency of licenses and would limit the potential for aggregation of licenses within an MTA.[29] It also would permit licensees to "cherry-pick" the most desirable markets within an area.[30] The return of only the less desirable markets would discourage participation in the reauction and could substantially delay the deployment of service to those areas. This danger does not exist at the MTA level because MTAs

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[27] NextWave Reply at 8; *ex parte* letter jointly filed by 43 companies on February 20, 1998, at 1. We also received letters from members of Congress generally supporting greater flexibility regarding licensees' ability to choose which licenses may be returned. The Honorable Xavier Becerra *ex parte* filing at 1; Members of the Congressional Hispanic Caucus *ex parte* filing at 2.

[28] *Second Report and Order*, 12 FCC Rcd at 16,455, 16,458, 16,463-64, 16,469 paras. 38, 44, 57, 67.

[29] *Id.*, 12 FCC Rcd at 16,463, 16,469 paras. 56, 67.

[30] *Id.*, 12 FCC Rcd at 16,455, 16,463-64, 16,469 paras. 38, 56-57, 67.

are large enough market areas that the value of an MTA would not be diminished if it was surrendered and its neighboring MTAs were not.

19. By allowing elections to be made on an MTA-by-MTA basis, we enable licensees to make election decisions that are not based solely on the elements of each option, but rather on their own business plans and financial situation. For example, a licensee may be successfully financing its license holdings on the east coast but experiencing difficulties in financing its west coast holdings. Under the approach adopted in the *Second Report and Order*, the prepayment option was the only means by which the licensee could return its west coast licenses while keeping its cast coast licenses.[31] We believe that the decision to retain or surrender licenses in an MTA should depend on the particular circumstances surrounding those licenses. The decision should not be driven by the terms of the options or by unrelated circumstances in other areas, which might dictate a universal election unsuitable for the licenses in that MTA.

20. Further, we believe that MTA-by-MTA elections will promote rapid deployment of service to the public.[32] Licensees will have more opportunity to localize their business plans by surrendering licenses in markets where success now seems unlikely due to financial difficulties. As a result, they will be able to focus on providing service in those markets where they have retained their licenses. In addition, the surrendered licenses presumably will be reauctioned to

[31] Note, however, that under the build-out exception to the original amnesty option, the licensee could retain any licenses that satisfied the build-out requirement. *Id.*, 12 FCC Rcd at 16,463-64 para. 57.

[32] See Communications Act § 309(j)(3)(A), 47 U.S.C. § 309(j)(3)(A).

entities better positioned to provide service in those license areas. Indeed, we anticipate that MTA-by-MTA elections will produce a more robust and competitive reauction. We expect more licenses to be returned for reauction because a licensee choosing disaggregation or resumption will now be free to surrender licenses it was reluctant to keep, but was forced to do so under the previous terms of those elections. Allowing those licenses to be reauctioned to entities that are more committed, or better able, to serve those markets will stimulate competition and benefit consumers. Furthermore, permitting elections on an MTA-by-MTA basis will not undermine the integrity of the auction process because licensees still must pay the full amount of their licenses.

V. RESUMPTION OF PAYMENTS

A. Background

21. In the *Second Report and Order*, the Commission rescinded, effective March 31, 1998, the Bureau's prior suspension of the deadline for all broadband PCS C block and F block installment payments.[33] All payments due and owing after March 31, 1998, were to be made in accordance with the terms of each licensee's Note, associated Security Agreement, and the Commission's Orders and regulations.[34] The Commission stated that all rules regarding installment payments and defaults for the broadband PCS C and F blocks would remain in effect, except as modified by the *Second Report and Order*.[35] The Commission ruled that any licensee

[33] *Second Report and Order*, 12 FCC Rcd at 16,449-50 para. 25.

[34] *Id.*

[35] *Id.*

that failed to remit the payment due on March 31, 1998, and remained delinquent for more than 60 days (in other words, failed to make the March 31, 1998, payment on or before May 30, 1998), would be in default on its license. As the Commission noted, the 60-day non-delinquency period was an exception to existing Commission rules that provide for an automatic 90-day non-delinquency period for each installment payment.[36]

22. The Commission directed in the *Second Report and Order* that Suspension Interest would become due and payable over a two-year period, beginning on March 31, 1998, on which date broadband PCS C and F block licensees would be required to submit one-eighth of the Suspension Interest.[37] After March 31, 1998, one-eighth of the Suspension Interest was to be paid along with each regular installment payment on each subsequent payment due date until the Suspension Interest had been fully paid.[38] Payment due dates would conform to those indicated in the Notes executed by the licensees.[39]

23. On February 24, 1998, we issued an order revising the

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[36] *Id. See also* 47 C.F.R. § 1.2110(f)(4)(i).

[37] *Second Report and Order*, 12 FCC Rcd at 16,449-51 paras. 25-27. For those C block licensees that retained licenses under the disaggregation option or under the build-out exception to the amnesty option, the Suspension Interest would be adjusted accordingly. C block licensees that elected the prepayment option or surrendered all licenses under the amnesty option would not be charged Suspension Interest.

[38] *Id.*

[39] *Id.* We previously provided specific examples of the schedule for paying the Suspension Interest. *See id.*, 12 FCC Rcd at 16,450-51 para. 27 and nn.53-54.

March 31, 1998, payment resumption date.[40] We stated that the payment resumption date would be at least 30 days after the date on which C block licensees must file a written election notice specifying their decision to resume payments under the terms of the original installment payment plan or to proceed under one of the alternative options. The election date was postponed in the same February 24, 1998, order to 60 days after publication of this reconsideration order in the *Federal Register*.[41] As we stated in that order, the Bureau will announce the specific dates for election and payment resumption as soon as this reconsideration order is published.[42]

B. Discussion

24. By the time they must resume making payments, C and F block licensees will have enjoyed a respite from their payment obligations substantially longer than one year. Several parties, however, seek a much longer deferral of the payment deadline.[43] We do not find their requests persuasive.

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[40] *Election Date Order II.*

[41] *Id.* The election date had been postponed once before on January 7, 1998. *Election Date Order I.*

[42] *Election Date Order II* at para. 3.

[43] *See* Alpine Petition at 13 and Alpine Reply at 8-9 (suggesting a moratorium on interest payments for up to five years); Cellexis Petition at 1, 5 and Cellexis Reply at 2-5 (supporting an earlier proposal by the U.S. Small Business Administration ("SBA") for a five-year deferral); McBride Petition at 5 (proposing elimination of all payments for the first seven years, with no interest on the debt for the first five years); Meretel Petition at 1-2 (asking the Commission to reconsider the deferral issue); MFRI Petition at 3 (endorsing a suspension of all payments until the end of the fifth year of the license, with the balance of principal and interest paid over the remaining five years of the license); NextWave Petition at 4-5, 22-25

No matter what deadline we establish, it is inevitablle that some licensees will seek more time to pay. As stated in the *Second Report and Order*, a more extensive deferral would be unfair to unsuccessful bidders that might not have withdrawn from the auction had they known of deferral opportunities.[44] The Commission properly rejected a further deferral because it did "not wish to adopt temporary solutions such as those that might only postpone these difficulties and further prolong uncertainty."[45] We agree with parties that urge the Commission to reject any attempts to extend further

(proposing a "modest deferral" to facilitate network deployment, while requiring payment in full with accrued interest within the existing license term); Next Wave Reply at 5-8 (proposing resumption of payments phased in on a graduated basis for first three years); New Wave Petition at 1, 2 (requesting a deferral spanning a period of five or more years); Northern Michigan Petition at 5-6 (indicating a preference for an additional two-year suspension); One Stop Wireless Petition at 2-3 (seeking consideration of SBA proposal for short-term deferral combined with extension of five-year construction deadline, or long-term deferral with no change in construction deadline); OnQue Petition at 2 (supporting a two-year deferral from December 31, 1996); RFW Petition at 1, 4-5 (recommending a five-year deferral of principal and interest payments); Urban Communicators Petition at ii, 2, 5-7 (asking for an extension of the suspension until March 31, 1999, and two additional one-year deferrals, so long as licensees make certain demonstrations of financial ability and substantial construction progress and pay an interest rate increased by 0.5 percent for the deferral period); CONXUS Opposition at 6 (agreeing with NextWave and Alpine); Duluth PCS, et al. Opposition at 5 (advocating a five-year deferral of payment obligations); and Polycell Opposition at 5 (same as Duluth PCS, et al.). See also The Honorable Barbara Boxer *ex parte* filing at 1 (asking the Commission to consider a "limited deferral"); The Honorable Albert R. Wynn *ex parte* filing at 1 (requesting that the payment resumption date be extended by six months).

[44] *Second Report and Order*, 12 FCC Rcd at 16,446-47 para. 18.

[45] *Id.*

the suspension of payments.[46]

25. Although we will not grant the lengthy postponement requested by some parties, we will provide modest relief by extending the non-delinquency period for licensees that fail to meet the payment resumption deadline. In response to Urban Communicators' request, we will extend to 90 days the automatic 60-day non-delinquency period applicable to payments due on the payment resumption date.[47] As mentioned above, the Commission's rules allow a 90-day non- delinquency period for all other installment payments.[48] Although we stated in the *Second Report and Order* that a shorter non-delinquency period was justified in light of the one-year payment suspension,[49] we now believe that it is preferable to make the length of that non-delinquency period consistent with our rule for all other payments. We are providing this 30-day extension to assist licensees that are experiencing last-minute delays in raising capital. We believe that by offering this additional time, we will help these licensees complete their fundraising efforts.

[46] *See, e.g.*, Antigone/Devco Opposition at 6 ("The public treasury is harmed by every deferral of payments."); AirGate Opposition at 10 ("as time elapses, the prospect for repayment diminishes"); Sprint Opposition at 5 ("further delay puts C block licensees at a competitive disadvantage, making attracting investment capital difficult; creates a cloud of uncertainty over the wireless sector; and unjustly enriches defaulting licensees by affording them financing opportunities not available to those who in good faith fulfilled their payment obligations"); Northcoast Opposition at 3-4 ("additional C Block installment payment rule changes would be bad policy because it would create uncertainty as to how the Commission will handle situations of licensee default that occur outside of the C Block context").

[47] Urban Communicators Petition at 7-8.

[48] 47 C.F.R. § 1.2110(f)(4)(i).

[49] *Second Report and Order*, 12 FCC Rcd at 16,449-50 para. 25.

26. Consistent with our rule for all other payments, payments made within this 90-day non-delinquency period will be assessed the 5 percent late payment fee that we recently adopted.[50] However, in light of the more than one-year suspension and this expanded non-delinquency period, we believe that a subsequent grace period is not warranted. Therefore, there will be no subsequent automatic grace period for licensees that fail to make payment within the 90-day non-delinquency period.[51] Subsequent payments, due after the initial resumption payment, will be subject to the rules adopted in the *Part I Third Report and Order*.

27. Under this plan, the Suspension Period (as defined in the *Second Report and Order*) will still end on March 31, 1998.[52] All interest accrued from the date of license grant through March 31, 1998, (i.e., Suspension Interest) will continue to be payable over eight equal payments. Interest accrued from April 1, 1998, through the payment resumption date will be due on the payment resumption date, in addition to one-eighth of the Suspension Interest. We believe that this plan will require licensees continuing under an installment

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[50] *See* Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, WT Docket No. 97-82, *Third Report and Order and Second Further Notice of Proposed Rule Making*, FCC 97-413 (released December 31, 1997) at para. 106 ("*Part 1 Third Report and Order*") (reconsideration pending). *See* 47 C.F.R. § 1.2110(f)(4)(i).

[51] *See Part 1 Third Report and Order* at para. 106; 47 C.F.R. § 1.2110(f)(4)(ii). *But see* The Honorable Albert R. Wynn *ex parte* filing at 1 (the Commission's newly adopted 180-day payment period should apply to C block licensees).

[52] *See Second Report and Order*, 12 FCC Rcd at 16,448 para. 21 (the Suspension Period was defined as "the period beginning with the date on which each license was conditionally granted through and including March 31, 1998").

payment plan, either through resumption or disaggregation, to demonstrate their financial viability by making a reasonable payment on the payment resumption date. This payment will evidence the ability of licensees to access the capital necessary to both service their government debt obligations and provide service to the public. In addition, we instruct the Bureau to modify the payment schedule so that all C and F block installment payments will be due on a quarterly basis, beginning on the payment resumption date.

28. We reject Urban Communicators' suggestion that Suspension Interest be forgiven, as well as its alternative proposals that Suspension Interest be paid either in a balloon at the end of the ten-year installment payment period or over six years in conjunction with other interest payments.[53] Because the Commission already has provided sufficient relief by granting the one-year suspension, we will neither forgive nor defer payment of the Suspension Interest. The Commission has accommodated licensees sufficiently by allowing payment of the Suspension Interest over eight equal payments.

29. We also reject requests from parties seeking a deviation from the payment schedule and from amounts established by the licensees' Notes.[54] We are providing all C block licensees

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[53] Urban Communicators Petition at 8-9.

[54] Alpine asks that: (1) principal and interest payments be spread over a period of 20 years; (2) principal and interest payments be paid annually, rather than quarterly; and (3) the accrual of interest be suspended from the date of license grant until 90 days after the issuance of reauctioned licenses. Alpine Petition at 12-13, n.6; *see also* Alpine Reply at 8. Alpine also argues that licenses awarded in the original C block auction have diminished in value and, on that basis, urges the Commission to reduce the price for each "so affected" license by 15 percent per year until 90 days after the grant of

with an array of alternative payment options, designed to accommodate licensees' various needs. These options were developed and are now being modified in an effort to balance complex and competing interests, with the recognition that it is impossible to devise alternatives that satisfy every entity with an interest in this proceeding. The record before us does not provide a sufficient basis for creating additional payment choices; indeed, there is opposition to our doing so.[55] Moreover, as explained above and in the *Second Report and Order*, the Commission purposefully adopted an approach that does not significantly alter the amounts paid for

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reauctioned licenses. Alpine Petition at 13 n.6. DiGiPH similarly maintains that reauction will result in lower prices for licenses than at the original auction and therefore requests that the Commission reduce the debt of original licensees in an amount equal to the average reduction in cost for licenses sold at reauction. DiGiPH Petition at 8-11. Northern Michigan states that cash flow projections are not sufficient to support principal repayment over only four years and believes that beginning principal payments in year six is feasible if repayment occurs over 15 years. Northern Michigan Petition at 5-6. In addition, Northern Michigan and McBride seek relaxation of the construction requirements for C block licensees but fail to present convincing rationales for their proposals. *See* Northern Michigan Petition at 9; McBride Petition at 5.

[55] *See* AT&T Opposition at 3 ("Bidders in any Commission auction understand that there is no guarantee of business success even if they win a license. The Commission should not now create an expectation that it will shield applicants or licensees from the results of bad business decisions, or take actions that suggest that some licensees are 'too big to fail.' The menu of options the Commission provided in the *Order* will provide most C-block licensees with sufficient financial relief to permit them to continue to participate in the wireless marketplace, although it may be on a reduced basis."); *see also* PrimeCo Opposition at 4 ("[A] fundamental restructuring of the installment payment terms previously established and agreed to would contravene the Commission's established auction objective of awarding licenses to parties who value them the most and are the most likely to rapidly deploy service." [citation omitted]).

individual licenses.[56] Retroactively changing the payment terms would be unfair to other applicants that might have bid differently under more relaxed payment terms.

30. Finally, we will not adopt the proposal made only by DiGiPH that the Commission somehow compensate those licensees that timely made the March 31, 1997, payment and, as a consequence, did not benefit from a suspension of that payment obligation.[57] Compensating licensees for complying with Commission rules would establish a precedent we consider inadvisable.[58] Furthermore, if a licensee opts to return all its licenses, we will refund any installment payments previously submitted for those licenses. If a licensee returns some licenses and retains others, the licensee will be allowed to apply previously submitted installment payments toward the prepayment of retained licenses or toward the Suspension Interest for retained licenses which the licensee does not prepay. For example, if a licensee elects resumption of payments for an MTA, any installment payments previously submitted for a BTA license within that MTA will be applied toward the Suspension Interest owed for that license, as described in the *Second Report and Order*.[59] The treatment of installment payments with respect to the

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[56] *Second Report and Order*, 12 FCC Rcd at 16,438-39 para. 5.

[57] *See* DiGiPH Petition at 7-8.

[58] Moreover, the Commission has no explicit authority to pay interest to licensees, which was one of DiGiPH's suggestions. *Id.* at 8. For example, unsuccessful bidders in Commission auctions do not earn interest on their upfront payments or down payments. Rather, the accrued interest on these funds is transferred to the Telecommunications Development Fund. *See* Communications Act § 309(j)(8)(C), 47 U.S.C. § 309(j)(8)(C); 47 C.F.R. §§ 1.2106(a) and 1.2107(b).

[59] *Second Report and Order*, 12 FCC Rcd at 16,451 n.54 para. 27.

disaggregation and prepayment options is specified below. Therefore, because installment payments will either be refunded or credited, we believe additional compensation is unnecessary.

VI. SURRENDER OF LICENSES FOR REAUCTION (AMNESTY)

A. Background

31. In the *Second Report and Order*, the Commission adopted an amnesty option under which a C block licensee would be permitted to surrender all of its licenses in exchange for relief from its outstanding debt.[60] The Commission would waive any applicable default payments, subject to coordination with the Department of Justice pursuant to applicable federal claims collections standards.[61] Licensees electing this option would not have their down payments returned; however, neither would they be deemed in default or delinquent in meeting government debt obligations.[62] In addition, they would be eligible to bid for any and all licenses in the reauction[63] and would not be restricted in making post-auction acquisitions.[64]

32. Subject to one exception, licensees availing themselves of the amnesty option would be required to surrender all of

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[60] *Second Report and Order*, 12 FCC Rcd at 16,462-64 paras. 53-58.

[61] *Id.*, 12 FCC Rcd at 16,462 para. 53. *See also* 4 C.F.R. Parts 101-105.

[62] *Second Report and Order*, 12 FCC Rcd at 16,462-63 para. 55.

[63] *Id.*, 12 FCC Rcd at 16,462 para. 54.

[64] *Id.*, 12 FCC Rcd at 16,439-40 para. 6.

their licenses to the Commission.[65] The sole exception to this "all-or-nothing" rule allowed licensees that met or exceeded the five-year build-out requirement on September 25, 1997, the date of adoption of the *Second Report and Order*, to keep licenses for built-out markets.[66] Specifically, a licensee utilizing this exception would be allowed to retain any built-out BTA, on the condition that it also keep any additional BTAs in the MTA where the built-out BTA is located and that it pay for all of those retained licenses under the terms of their original notes.[67]

33. The Commission noted in the *Second Report and Order* that, although the Bureau had suspended installment payments on C block licenses on March 31, 1997, some licensees had made installment payments after the suspension.[68] In addition, some licensees had made their regularly scheduled installment payments prior to the suspension.[69] The Commission directed the Bureau to refund any installment payments made (whether due on or before March 31, 1997) on any license surrendered under the amnesty option and announced that it would forgive payment of any due, but unpaid, installment payments for any surrendered license.[70] Licensees retaining licenses under the

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[65] *Id.*, 12 FCC Rcd at 16,463 para. 56.

[66] *Id.*, 12 FCC Rcd at 16,463-64 para. 57.

[67] *Id.*

[68] *Id.*, 12 FCC Rcd at 16,464 para. 58. Some of these payments were installments due on March 31, 1997; others were amounts due on December 31, 1996, but not paid until March 31, 1997, based on the Commission's automatic 90-day non-delinquency rule. *Id.*

[69] *Id.*

[70] *Id.*

build-out exception were to pay over eight equal payments (beginning with the payment due on March 31, 1998) all Suspension Interest applicable to the retained licenses. All installment payments previously made by the licensee on any of its licenses would be applied to reduce the Suspension Interest applicable to the retained licenses, and any amounts remaining would be refunded.[71]

B. Discussion

34. In keeping with our decision on reconsideration to allow licensees to make elections on an MTA-by-MTA basis, we modify the amnesty option to permit licensees to select that option for as many of their MTAs as they choose. Because amnesty no longer requires an "all-or-nothing" choice, we also eliminate as moot the build-out exception.[72] Our decision is consistent with DiGiPH's recommendation that licensees be permitted "to return licenses for all BTAs on a per MTA basis, separate and apart from having met the

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[71] *Id.*

[72] NextWave's request that the Commission "clarify" that the build-out exception encompasses all licensees that "invested significantly" in network build-out activities is now moot. *See* NextWave Petition at 17. *See also* Airtel Petition at 1; Christensen Petition at 1; CVI Wireless Petition at 1; Koll Petition at 1; Leifer, Marter Petition at 1; URS Greiner Petition at 1; Dorne & Margolin *ex parte* filing at 1. Also moot is Omnipoint's suggestion that we allow licensees to disaggregate licenses retained under the build-out exception. *See* Omnipoint Petition at 5-6; Omnipoint Reply at 1-2. Permitting licensees to make elections on an MTA-by-MTA basis eliminates any need for Omnipoint's proposal because licensees are free to disaggregate licenses in any built-out MTAs they wish to retain.

five- year build out provisions . . . ."[73] The change also satisfies Alpine's request that licensees be entitled to turn in any or all of their licenses under amnesty.[74]

35. The Commission originally adopted the "all-or-nothing" requirement for the amnesty option in order to prevent licensees from "cherry-picking" only the most desirable MTAs.[75] The Commission believed that facilitating a "cherry-picking" scheme would limit the potential for licenses to be aggregated, which would decrease their value to bidders in the reauction.[76] On reconsideration, we find persuasive DiGiPH's contention that requiring licensees to keep or surrender entire MTAs, rather than BTAs, will sufficiently limit "cherry-picking."[77] We also agree with DiGiPH's position that applying the amnesty option on an MTA-by-MTA basis does not carry a risk of "cherry-picking" significantly different from that connected with the original disaggregation option.[78]

36. Several parties object to the fact that a licensee does not receive any refund of its down payment under the amnesty

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[73] DiGiPH Petition at 4-7. DiGiPH offered this recommendation as an alternative to its suggestion that the Commission extend the date by which licensees would have to have met the five-year build-out requirement for the build-out exception. *Id. See also* NextWave Reply at 8.

[74] Alpine Petition at 9-10.

[75] *Second Report and Order*, 12 FCC Rcd at 16,463 para. 56.

[76] *See id.*, 12 FCC Rcd at 16,469 para. 67.

[77] DiGiPH Petition at 4-5.

[78] *Id. See also* NextWave Reply at 8 ("[T]he Commission should allow licensees to select options on an MTA basis. Establishing an MTA rule across the board eliminates any concern that permitting flexible selection of options would result in cherry picking.").

option.[79] As the Commission explained in the *Second Report and Order*, its intent in retaining the down payment was to ensure that licensees electing the amnesty option and participating in the reauction of their surrendered licenses do so without the undue advantage of having all of their original funds available to repurchase the same spectrum they surrendered.[80] The Commission further explained that licensees selecting amnesty would benefit substantially by avoiding being declared in default and thereby being freed from assessments of delinquencies and other collection costs associated with default payments.[81] The rationale of the *Second Report and Order* continues to be valid. If we were to allow C block licensees to return their licenses, receive a refund of their down payments, and participate in the reauction, we would undermine the integrity of the auction process by placing amnesty licensees in virtually the same position they would have occupied had the initial C block auction never taken place.

37. Nevertheless, we recognize that because all elections

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[79] *See* Alpine Petition at 9-10; Hyundai Petition at 6 (contending that "forfeiture of up to 100 percent of a down payment does not appear rationally related to any harm"); Hyundai Reply at 4-7; McBride Petition at 2, 4 (claiming that the amnesty option is punitive in nature and requesting "100 percent return of all down payments, plus all the interest payments"). *See also* AmeriCall Opposition at 5-7 ("fairness and equity require at least that the forfeiture in an amnesty or disaggregation election be no greater than the forfeiture by a licensee electing prepayment . . . .").

[80] *Second Report and Order*, 12 FCC Rcd at 16,462-63 para. 55.

[81] *Id.*; *see also* 47 C.F.R. § 1.2110(f)(4)(iii), (iv). We note that both AmeriCall and Omnipoint ask that we establish specific timing goals for providing refunds to licensees electing the amnesty option. AmeriCall Petition at 3; Omnipoint Opposition at 14. The Bureau will address this issue in a forthcoming public notice on procedures.

now are being applied on an MTA-by-MTA basis, licensees are permitted to return licenses in certain MTAs and retain licenses in other MTAs, as with the prepayment option under the *Second Report and Order*. Thus, licensees electing the amnesty option have the following choice. For licenses in each MTA returned under the amnesty option, the licensee may choose either to: (1) receive no credit for its down payment(s) but remain eligible to bid in the reauction on all its licenses in the returned MTA (pure amnesty), or (2) obtain credit for 70 percent of its down payment and forgo for a period of two years from the start date of the reauction eligibility to reacquire the licenses it surrendered pursuant to this option through either reauction or any other secondary market transaction (amnesty/prepayment).[82] For purposes of this two-year eligibility restriction, a licensee includes qualifying members of the licensee's control group and their affiliates.[83] The 70 percent credit must be applied toward prepayment of the entire principal owed for a retained MTA with 30 MHz licenses and/or toward prepayment of the entire principal owed for the retained 15 MHz licenses of an MTA that has been disaggregated. Providing an additional choice within the amnesty option substantially increases the level of flexibility available to licensees and enables them to formulate new business plans that may be more attractive to lenders and investors. It also reflects a suggestion made by Alpine that licensees not participating in the C block reauction lose a substantially smaller portion of their down

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[82] As mentioned above, if a licensee opts to return all its licenses, we will refund any installment payments previously submitted for those licenses.

[83] *See* Section X.B.2. below for the definition of "affiliate."

payment than that lost by licensees that do participate.[84]

VII. PREPAYMENT

A. Background

38. In the *Second Report and Order*, the Commission offered C block licensees the option to prepay the outstanding principal debt obligations for any licenses, on an MTA basis, that they elected to retain, subject to the restriction described below. The remaining licenses were required to be surrendered to the Commission for reauction.[85] In exchange, the Commission would forgive the debt on the surrendered licenses, and any associated payments owed.[86] A licensee electing this option would make its prepayment by using 70 percent of the total of all down payments made on the licenses it surrendered to the Commission, plus 100 percent of any installment payments previously paid for all licenses (collectively, "Available Down Payments"),[87] plus any "new

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[84] *See* Alpine Petition at 9-10 ("[W]ith respect to the amnesty option, the Commission should revise the requirement for the forfeiture of down payments so that licensees have some incentive to accept this option. For those entities *not* participating in the re-auction, a substantially lesser penalty, keyed at most to the estimated cost incurred in re-auctioning the spectrum, would be a more appropriate means of insuring the integrity of the Commission's auction processes than total loss of the down payment. As to those entities who would desire to bid on such spectrum in the re-auction, a penalty of at most 30 percent of the previously made down payment would be appropriate.").

[85] *Second Report and Order*, 12 FCC Rcd at 16,467-70 paras. 64-69.

[86] *Id.*, 12 FCC Rcd at 16,467 para. 64.

[87] We clarify that the term "Available Down Payments," as used in paragraph 64 of the *Second Report and Order*, was intended to include both 70 percent of the down payment made on surrendered licenses and any

money" it was able to raise.[88] The remaining portion of the down payment applicable to the surrendered licenses would not be refunded or credited but simply would be retained by the Commission.[89] Licensees would be prohibited from bidding on their returned spectrum in the reauction or from reacquiring it in the secondary market for two years from the start of the reauction. Licensees could, however, bid on spectrum or licenses surrendered by other licensees, provided such licensees were not affiliates.

39. The requirement that a licensee had to prepay all its BTA licenses within those MTAs that it selected for prepayment prevented "cherry-picking" because licensees could not prepay only the most desirable BTA licenses within a given MTA and then surrender the rest.[90] The one exception to this rule was that any licensee lacking sufficient funds to prepay every BTA license within a chosen MTA would be permitted to prepay only those BTA licenses within that MTA that it could afford.[91] The licenses for the remaining BTAs within that MTA which the licensee could not afford to prepay would be surrendered to the Commission.

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installment payments previously submitted for those licenses. *Id.*

[88] *Id.* Since the *Second Report and Order* established that interest already paid is to be wholly credited toward prepayment under this option, Urban Communicators' request to that effect is moot. Urban Communicators Petition at 10.

[89] *Second Report and Order*, 12 FCC Rcd at 16,467 para. 64.

[90] *Id.*, 12 FCC Rcd at 16,469 para. 67.

[91] *Id.*

B. Discussion

40. By providing a license free and clear of debt and payment conditions, prepayment makes it easier for licensees to raise the additional capital necessary to build out their systems and deploy new services. Thus, consumers benefit by receiving service sooner. Prepayment also removes the Commission from the role of lender, which sometimes may conflict with its responsibilities as a regulator.[92] In addition, prepayment benefits the public because it assures taxpayers of full payment of licenses. Indeed, we have implicitly expressed our preference for prepayment by eliminating installment payments as a means of financing small business participation for the immediate future.[93]

41. Under our modified approach, the prepayment option remains essentially the same as set forth in the *Second Report and Order*. For any 30 MHz licenses that are returned to the Commission, the licensee may continue to apply 70 percent of the down payment made on those licenses toward the prepayment of the entire outstanding principal owed in retained MTAs. The licensee may pool any down payment amounts that have been designated for prepayment, plus installment payments previously paid on any returned licenses.[94] We will refer to this pool of credit as a licensee's

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[92] *See* FCC Report to Congress on Spectrum Auctions, WT Docket No. 97- 150, *Report*, FCC 97-353 (released October 9, 1997) at 39-40.

[93] *Part I Third Report and Order* at paras. 38-40.

[94] As described below, down payment amounts may also come from disaggregated licenses if the licensee uses the credit for prepayment. The treatment of installment payments previously submitted for disaggregated licenses is also described below.

"Prepayment Credit."[95] This Prepayment Credit may be used to prepay any retained MTAs with 30 MHz licenses. As will be discussed in more detail below, it also may be used to prepay the retained 15 MHz licenses of any MTAs that have been disaggregated.

42. As under the *Second Report and Order*, any "new money" that is used to make prepayment must be submitted on or before the election date. Unlike under the *Second Report and Order*,[96] affiliated licensees will be allowed to combine their Prepayment Credits.[97] However, any affiliated licensees that choose to pool their Prepayment Credits will be considered one licensee for purposes of making elections. Therefore, the elections made by those affiliates must be made in concert and must be made on an MTA-by-MTA basis, as is required of individual licensees.[98] Credit pooling does not require the participation of all of a licensee's affiliates. Any affiliate that chooses not to pool its credit along with its other affiliates will be considered an individual licensee for purposes of making elections. We believe on

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[95] The term "Prepayment Credit" is essentially a substitution for the term "Available Down Payments," updated to account for the additional flexibility provided under our modified approach.

[96] *Second Report and Order*, 12 FCC Rcd 16,467 n.144 para. 64.

[97] *See* Section X.B.2. below for the definition of "affiliate."

[98] Therefore, if affiliated licensees decide to pool their credits, then all BTA licenses held by any of those affiliates must be surrendered for credit in any MTA where one of their BTA licenses is surrendered for credit. Similarly, those affiliated licensees must collectively select MTAs for prepayment, and all BTA licenses held by any of those affiliates in those selected MTAs must be prepaid, subject to the affordability exception. Likewise, if those affiliated licensees choose to disaggregate an MTA, then all BTA licenses held by any of those affiliates in that MTA must be disaggregated, and so on.

reconsideration that allowing this flexibility is consistent with the fact that, for purposes of the reauction, we consider a licensee and its affiliates to be the same entity. It also will prevent licensees from being disadvantaged if, without such a rule, they would have been precluded from electing prepayment by virtue of the fact that they transferred BTA licenses to affiliates.

43. In response to a request from DiGiPH, we make one important clarification. DiGiPH argues that, because affordability is a concept subject to differing interpretations, the Commission should further define its requirement that a licensee must prepay all of those BTA licenses within the MTA "that it can afford."[99] We clarify that, for purposes of this exception, a licensee can "afford" to prepay all of its BTA licenses within that MTA if it can prepay all BTA licenses using only its Prepayment Credit. If this amount is not enough to prepay all its BTA licenses within an MTA, the licensee must prepay as many BTA licenses in the MTA as this amount will allow and must surrender for reauction the remaining BTA licenses that it cannot afford to prepay.[100] Only under these circumstances may a licensee choose, within the given MTA, which BTA licenses to prepay and which to surrender. Once a licensee adds any "new money" at all to make prepayment, the affordability exception does not apply, and the licensee must add sufficient "new money" that, when added to its Prepayment Credit, is adequate to prepay all its BTA licenses within its chosen MTAs. A

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[99] DiGiPH Petition at 11-12.

[100] *But see* ClearComm *ex parte* filing at 1 (urging the Commission to allow licensees to prepay one or more BTA licenses in an MTA while retaining, and resuming payments on, the remaining BTA licenses in the MTA).

licensee claiming the affordability exception may choose only one MTA in which it will apply, and it must prepay all its BTA licenses within all other MTAs selected for prepayment. The Commission will not refund any unspent portion of the Prepayment Credit.[101] We believe retaining any unspent portion of the Prepayment Credit is a reasonable price for relieving the requirement that all BTA licenses in all MTAs be prepaid. The affordability exception also will apply to disaggregated MTAs that the licensee wishes to prepay.

44. This clarification provides an objective means for licensees to implement the affordability exception. It

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[101] For example, assume a licensee owns 30 licenses held in 3 MTAs as follows: 2 licenses in MTA #1, 12 licenses in MTA #2, and 16 licenses in MTA #3; that each license cost $100,000; that the licensee made a down payment of $10,000 on each license leaving $90,000 as the debt on each license; and that the licensee made no installment payments. If the licensee chooses to prepay the licenses in MTA #1, its Prepayment Credit will be $196,000 (28 x $10,000 down payment for each license not being prepaid x 70 percent). Utilizing its Prepayment Credit of $196,000, the licensee can "afford" to prepay all of its licenses in MTA #1. The unspent portion of its Prepayment Credit [$196,000 less (2 x $90,000) = $16,000] will be retained by the Commission.

If instead the licensee decided to prepay licenses in MTA #3, it can only "afford" to prepay 2 of those 16 licenses calculated as follows: 2 x $90,000 = $180,000 needed to prepay; Prepayment Credit is calculated as follows: 28 x $10,000 x 70 percent = $196,000. The licensee may elect which 2 licenses to prepay and must surrender the remaining 14 licenses. The Commission will retain the unspent portion of the Prepayment Credit, which is $16,000 [$196,000 less (2 x $90,000) = $16,000]. If, however, the licensee elects to add "new money" to its Prepayment Credit, it *must* add enough "new money" to the Prepayment Credit to prepay the remaining 14 licenses in MTA #3 (i.e., 14 x $90,000 less $16,000 = $1,244,000 of "new money" needed). The licensee may not add only $74,000 of "new money" and prepay a third license while surrendering the remaining 13 unprepaid licenses.

eliminates any doubt or confusion regarding the scope of the term "afford," and it is an easy, bright-line test to administer. In addition, we believe the restrictions we impose on the affordability exception minimize a licensee's ability to "cherry-pick" among BTAs. Therefore, we reject Omnipoint's request that the Commission eliminate the affordability exception, or in the alternative, grant all licensees unlimited flexibility under all options to select which BTA licenses to retain and which to surrender.[102]

45. We reject arguments claiming that the prepayment option should be revised or eliminated because it benefits only certain licensees.[103] Each of the payment relief options presented to C block licensees is designed to strike a fair balance of competing interests, with benefits and obligations appropriate to varying circumstances. Although these options are intended to provide distinct choices for licensees, they adhere to a consistent set of principles. Moreover, the available choices complement each other to provide a range of alternatives to the various C block licensees experiencing financial difficulties. Because it is an important component in this package of options and because we continue to believe it is sound as a matter of policy, we decline to eliminate the prepayment option. A menu of options is provided because no single solution would be appropriate for every situation; therefore, eliminating any one option would prejudice those

[102] Omnipoint Opposition at 9; Omnipoint Reply at 2.

[103] *See* McBride Petition at 2-3 (the prepayment option favors large bidders that have multiple licenses from which to choose, whereas small bidders seeking to keep licenses with payment relief are forced to disaggregate); Central Oregon Petition at 6 (single licensees get no benefit from the buy-out option); Omnipoint Reply at 2 (the prepayment option should be eliminated because "it amounts to nothing other than an opportunity for a handful of the largest bidders to 'cherry-pick' licenses").

licensees for which it may be best suited.

46. We note that we received numerous requests to allow licensees to use their entire down payment under the prepayment option.[104] We will maintain our rule that licensees electing the prepayment option will receive no refund or credit for 30 percent of the down payment made on 30 MHz licenses they surrender to the Commission. We believe that retention of this portion of the down payment is necessary to preserve the integrity of the auction process.[105] Furthermore, to return the entire down payment would undermine the purpose of the down payment -- to help ensure performance on a licensee's debt obligation.[106] We disagree with parties that characterize retention of a portion of the

[104] *See* Airtel Petition at 1; Alpine Petition at 10; Cellexis Petition at 6; Cellnet Petition at 2; Christensen Petition at 1; CVI Wireless Petition at 1; Federal Network Petition at 1; Fox Communications Petition at 1; Koll Petition at 1; Leifer, Marter Petition at 1; Meretel Petition at 3; MFRI Petition at 4; New Wave Petition at 1; NextWave Petition at 10-15; OnQue Petition at 2; One Stop Wireless Petition at 2; Prime Matrix Petition at 1; RFW Petition at 5; UCNI Petition at 2; Urban Communicators Petition at 10; URS Greiner Petition at 1; Wireless Nation Petition at 2; Duluth PCS, et al. Opposition at 5-8; Polycell Opposition at 5-8; Third Kentucky Opposition at 2; CX Systems *ex parte* filing at 1; Cyber Sites *ex parte* filing at 1; Dorne & Margolin *ex parte* filing at 1. See also Hyundai Petition at 4-7; Christensen *ex parte* filing at 1; Florida Power *ex parte* filing at 1; Kabbara *ex parte* filing at 1; LaBarge Clayco *ex parte* filing at 1; Leifer, Marter *ex parte* filing at 1; MJA *ex parte* filing at 1; OPM *ex parte* filing at 1; Specialty Teleconstructors *ex parte* filing at 1; Structure Consulting *ex parte* filing at 1; Xway *ex parte* filing at 1; MRFI Reply at 1; Wireless Ventures Reply at 3.

[105] *See* Communications Act § 309(j), 47 U.S.C. § 309(j).

[106] *See* Communications Act § 309(j)(4)(B), 47 U.S.C. § 309(j)(4)(B); In the Matter of BDPCS, Inc., *Order*, 12 FCC Rcd 6606 (WTB 1997), *application for review pending*.

down payment as punitive,[107] a penalty,[108] or a forfeiture.[109] We view 30 percent of the down payment as the fair and reasonable price for receiving the benefits of this option.[110] We also note that AirGate correctly characterizes the prepayment option as a method of providing licensees with more flexibility in using their down payments than is permitted under current rules.[111]

47. We disagree with NextWave, Cellexis, and other parties that the Commission should account for the net present value of forgoing installment payments,[112] or otherwise discount the

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[107] *See, e.g.*, Alpine Petition at 8; RFW Petition at 5; MFRI Petition at 4.

[108] *See, e.g.*, NextWave Petition at 10-15; Duluth PCS, et al. Opposition at 5-6; Polycell Opposition at 5-6.

[109] *See, e.g.*, AmeriCall Opposition at 5-7; Hyundai Reply at 4-6.

[110] Several parties asking the Commission to reject petitioners' request to use the entire down payment under the prepayment option reiterate the Commission's discussion on this matter in the *Second Report and Order*. *See* Sprint Opposition at 4-5 (arguing that giving full credit would be unfair to unsuccessful bidders and to licensees that resume payments under their existing obligations); Antigone/Devco Opposition at 3-5 (asking the Commission to retain 30 percent of the down payment to preserve the integrity of the auction process). Although Omnipoint recognizes that retaining the 30 percent down payment on surrendered licenses is not punitive, we disagree with its reasoning that it accounts for reauction costs to the government. *See* Omnipoint Opposition at 3-5.

[111] AirGate Opposition at 13. AirGate notes that it would support "a limited exception" to permit licensees that elect to prepay all of their C block licenses to use all of their down payment toward the cash purchase price. *Id.* at 13 n.22. No such exception is necessary, given that AirGate's scenario is no different from paying off the entire installment debt early.

[112] *See* NextWave Reply at 8-9 (net present value accurately presents the size of PCS debt in light of the licensee's higher cost of capital compared to the government rate of interest); Cellexis Reply at 6 (by

principal amount due under the installment payment plan.[113] As Sprint points out, the Commission has considered this argument extensively and properly rejected it.[114] In the *Second Report and Order*, the Commission stated that a licensee should be required to pay the face value of its auction bid.[115] Accounting for the net present value of

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charging nominal value rather than net present value, the Commission is raising the effective price of the license). *See also* Airtel Petition at 1; Alpine Petition at 10; Cellexis Petition at 6-7; Cellnet Petition at 2; Central Oregon Petition at 4- 6; Christensen Petition at 1; CVI Wireless Petition at 1; Federal Network Petition at 1; Fox Communications Petition at 1; Koll Petition at 1; Leifer, Marter Petition at 1; MFRI Petition at 4-5; New Wave Petition at 1; NextWave Petition at 5-10; Northern Michigan Petition at 7; OnQue Petition at 2; One Stop Wireless Petition at 2; Prime Matrix Petition at 1; RFW Petition at 6; URS Greiner Petition at 1; UCNI Petition at 2; Urban Communicators Petition at 10; Wireless Nation Petition at 2; Meretel Petition at 2; Polycell Opposition at 9; Duluth PCS, et al. Opposition at 9; Third Kentucky Opposition at 2; Christensen *ex parte* filing at 1; CX Systems *ex parte* filing at 1; Cyber Sites *ex parte* filing at 1; Dorne & Margolin *ex parte* filing at 1; Florida Power *ex parte* filing at 1; LaBarge Clayco *ex parte* filing at 1; Leifer, Marter *ex parte* filing at 1; MJA *ex parte* filing at 1; OPM *ex parte* filing at 1; Specialty Teleconstructors *ex parte* filing at 1; Structure Consulting *ex parte* filing at 1; Xway *ex parte* filing at 1; Wireless Ventures Reply at 3.

[113] *Compare* Alpine Petition at 10 (a 59 percent discount from the face amount of the note would account for the present value of the Commission's financing) *with* NextWave Petition at 5-10 (arguing for a discount rate of at least 15 percent) and Third Kentucky Opposition at 2 (same as NextWave). *See also* Meretel Petition at 2 (prepayment is not a viable option unless the prepaid amount is equal to or below that of the price paid for A and B block licenses).

[114] Sprint Opposition at 4.

[115] *Second Report and Order*, 12 FCC Rcd at 16,468 para. 66. *See also id.*, Separate Statement of Susan Ness, 12 FCC Rcd at 16,511 ("In my view, the price bid is the price bid. Bidders were not offered a cash versus credit price.").

forgoing installment payments would rewrite the auction results because it would have the effect of changing the amounts bid for licenses.[116] Therefore, to do so would be unfair to those bidders that withdrew from the auction under the assumption that the winning bid amounts represented the prices that would be paid for the licenses.[117] Because we continue to support the policy that auction bids should be paid at their face value, we will not discount the principal due.[118] Although the Commission provides favorable terms for financing the bid price, the cost of an installment payment plan is the interest that accrues over time. The benefit to a licensee for early pay-off of its financial obligations is the savings in the amount of interest that otherwise would be owed.[119] We believe this trade-off provides a further reason for not discounting the principal.

48. We decline to provide further flexibility under the

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[116] *See* AirGate Opposition at 7-9 (a reduction in bid amounts would translate into a rewrite of the auction results).

[117] *See* Omnipoint Opposition at 6-7 (a net present value discount would be fundamentally unfair to other bidders in the auction that properly relied on the Commission's rule that high bidders must pay the entire nominal amount of their bids or their licenses automatically cancel).

[118] Moreover, if we were to discount the debt at a licensee's cost of capital it would be impossible to determine accurately a cost of capital for all licensees. The cost of capital varies for each licensee because it is based on a licensee's individual cost of debt and equity and on the ratio of debt to equity. Therefore, no single discount rate would be appropriate for every licensee. *See* Omnipoint Opposition at 6-8 (a net present value discount "would be impossible to implement in a manner that is fair and avoids unjust enrichment, because all parties -- including each Block C licensee and the U.S. Government -- have separate costs of capital").

[119] *See* ALLTEL Opposition at 2-4; Northcoast Opposition at 5; Antigone/Devco Opposition at 2; Fidelity Capital Opposition at 3-4.

prepayment option. Cellexis requests that the Commission grant the five-year build-out exception provided under the amnesty option to licensees choosing the prepayment option.[120] A build-out exception is not needed because, under our modified approach, licensees are permitted to retain any MTAs they wish, whether built- out or not. Regardless, even under the approach adopted in the *Second Report and Order*, a build-out exception was unnecessary because licensees had the discretion to choose which MTAs to prepay and which to surrender, as opposed to the "all-or-nothing" approach under the original amnesty option.[121] In addition, we decline MFRI's request to allow a licensee that holds both C and F block licenses to use its C block down payment to purchase for cash its F block licenses.[122] We do not believe such flexibility is warranted because the reduction of debt associated with prepayment will help those licensees address their capital needs in servicing their F block debt. Finally, Urban Communicators argues that the requirement that prepaying licensees must purchase all BTA licenses held within an MTA is unfair to licensees that have licenses in only one MTA.[123] We disagree. This restriction is essential to prevent "cherry-picking," and a licensee that cannot avail itself of this option can either choose another option or limit its purchases under the affordability exception, if applicable.

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[120] Cellexis Petition at 6.

[121] *See Second Report and Order*, 12 FCC Rcd at 16,469 para. 68.

[122] MFRI Petition at 5.

[123] Urban Communicators Petition at 10. *But see* AirGate Opposition at 14- 15 (licensees should not be permitted to return licenses on a BTA-by-BTA basis).

VIII. DISAGGREGATION OF SPECTRUM FOR REAUCTION

A. Background

49. In the *Second Report and Order*, the Commission offered C block licensees the option to disaggregate a portion of their spectrum and return it to the Commission for reauction.[124] Licensees electing the disaggregation option would return one-half (i.e., 15 MHz of 30 MHz) of their spectrum from each of their BTA licenses within the MTAs in which they chose to disaggregate spectrum.[125] In other words, licensees would not be required to disaggregate spectrum for all of the licenses they hold, but they would have to disaggregate spectrum for all of the licenses they hold in a given MTA if they disaggregated spectrum for one license in that MTA. The returned spectrum would have to be at 1895 - 1902.5 MHz paired with 1975 - 1982.5 MHz, which is spectrum contiguous to the F block.[126]

50. In exchange, the Commission would reduce by 50 percent the amount of debt that was owed on a 30 MHz license before it was disaggregated.[127] Fifty percent of the down payment made on the 30 MHz license would be considered the down payment for the retained 15 MHz of spectrum, but the Commission would not provide a refund or credit for the remaining 50 percent of the down payment.[128]

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[124] *Second Report and Order*, 12 FCC Rcd at 16,455 para. 38.

[125] *Id.*

[126] *Id.*, 12 FCC Rcd at 16,456 para. 39.

[127] *Id.*, 12 FCC Rcd at 16,456 para. 40.

[128] *Id.*

Licensees were required to repay over eight equal payments (beginning with the payment due on March 31, 1998) all Suspension Interest, adjusted to reflect the reduction in debt obligation.[129] Any installment payments that were paid prior to the suspension would be credited in full against those amounts.[130] Licensees were prohibited from bidding on their returned spectrum in the reauction or from reacquiring it in the secondary market for two years from the start of the reauction.[131] Licensees could, however, bid on spectrum or licenses surrendered by other licensees, provided such licensees were not affiliates.[132]

B. Discussion

51. As provided under the *Second Report and Order*, when a licensee disaggregates an MTA, it will receive full credit for the portion of the down payment applicable to the spectrum retained from a license (i.e., 50 percent of the down payment made on the original 30 MHz license). However, on reconsideration, we modify our decision that licensees electing the disaggregation option receive no refund or credit for the portion of the down payment applicable to the returned spectrum. For each disaggregated license for which the licensee elects to resume installment payments, rather than prepay, we will provide a credit of 40 percent of the down payment applicable to the 15 MHz of spectrum that is returned to the Commission. The 40 percent credit may only be used to reduce the amount owed on the 15 MHz of

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[129] *Id.*

[130] *Id.*

[131] *Id.*, 12 FCC Rcd at 16,457 para. 42.

[132] *Id.*

spectrum retained from the same BTA license that generated the credit. The credit, at the licensee's option, may be applied either to Suspension Interest and/or to reduce the principal outstanding.[133] Any installment payments previously submitted for a disaggregated license for which the licensee elects to resume installment payments will be credited as described in the *Second Report and Order* (i.e., toward Suspension Interest).[134]

52. We derived the 40 percent credit because when it is combined with the 100 percent credit associated with the retained spectrum, the licensee will receive a credit of 70 percent of the total down payment for the original 30 MHz license. We have decided to allow this additional credit because we are persuaded by the argument of several parties that the credit permitted under the disaggregation option should be consistent with the 70 percent credit permitted under the prepayment option.[135] We believe the disparity that

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[133] *See* The Honorable Albert R. Wynn *ex parte* filing at 1-2 (licensees electing disaggregation should be allowed "to apply their excess down payments and interest payments they have made to their upcoming installment payments, thereby providing them, in exchange for actual money already paid to the U.S. Government, a brief extension of time to complete their financing").

[134] *Second Report and Order*, 12 FCC Rcd at 16,456 para. 40.

[135] Omnipoint Petition at 8-9; McBride Petition at 1-2; AmeriCall Opposition at 6. *See also* ClearComm Petition at 18-21 (if the Commission refuses to allow licensees full use of their down payments, then licensees electing disaggregation should at least not be subject to a greater penalty than those electing prepayment). *But see* AirGate Opposition at 12 (the Commission's decision to retain 50 percent of the down payment is reasonable).

As discussed above, a licensee that selects the amnesty option and chooses to bid on its returned licenses in the reauction will not receive credit for any

existed under the *Second Report and Order* was unfair to licensees that were precluded from electing prepayment. Furthermore, allowing this additional credit will advance the purposes of the disaggregation option. Disaggregation benefits both licensees and consumers because it provides a means for licensees to remain in a market area at a significantly reduced cost. By having their outstanding debt decreased by 50 percent, licensees improve their ability to finance their retained spectrum and build out their networks. In addition, disaggregation is pro-competitive because it provides a means for other competitors to enter a market area. It also gives unsuccessful bidders an opportunity to rebid on spectrum in market areas in which they were initially outbid. We believe the additional 40 percent credit will promote these benefits of disaggregation and will help licensees that have expressed an interest in disaggregation to take advantage of this option and continue their plans to provide service in their license areas.

53. We believe a 40 percent credit is warranted when a licensee resumes installment payments on a disaggregated MTA because the licensee remains in the MTA and continues building out its network in order to serve those consumers. We will not provide such a 40 percent credit to licensees that resume installment payments on a license in a different MTA. In contrast to a licensee that uses the 40 percent credit to resume installments on the retained portion of the disaggregated license, a licensee that seeks to apply a 40 percent credit from down payments made on licenses returned under an amnesty election would have, under those

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of its down payment made on its returned licenses. We believe a licensee's opportunity to bid on its returned licenses is equitable compensation for not receiving any down payment credit.

circumstances, abandoned service to the entire licensed area affected by that election. We believe that licensees that surrender licenses should not receive a credit for abandoning those markets unless they use the credit to prepay retained licenses.

54. We also revise the approach adopted in the *Second Report and Order* to provide for a combination of disaggregation and prepayment. As we have discussed, there are many advantages to both prepayment and disaggregation, and we believe a combination of the two should be encouraged because it offers the benefits of both options. For example, the licensee continues to build out its network in the market area, the Commission is relieved from its position of lender, and competing entities have the opportunity to bid on the returned spectrum. Therefore, if a licensee disaggregates an MTA and prepays the outstanding principal owed on the retained portion of the MTA, we will provide the licensee with a higher percentage of credit as an incentive to choose both disaggregation and prepayment. Instead of a 40 percent credit, a licensee that elects both disaggregation and prepayment will receive credit for 70 percent of the down payment applicable to the returned spectrum.[136] This 70 percent credit will be added to the licensee's Prepayment Credit which, as explained above, may be used to prepay any retained MTAs with 30 MHz licenses and/or the retained portions of any MTAs that have been disaggregated. Allowing this 70 percent credit is consistent with our policy of providing a 70 percent credit for 30 MHz licenses that are returned to the Commission. In both cases, the credit is 70

[136] The portion of the down payment applicable to the returned spectrum is the equivalent of 50 percent of the down payment made on the original 30 MHz license.

percent of the down payment associated with the amount of spectrum that is returned. In addition, any installment payments previously submitted for the licenses in an MTA that is both disaggregated and prepaid will be added to the licensee's Prepayment Credit.

55. If a licensee elects both disaggregation and prepayment for an MTA, the licensee must prepay the principal owed on the 15 MHz of spectrum retained from each BTA license in the MTA. However, if a licensee's Prepayment Credit is insufficient to make full prepayment on the entire MTA, then the affordability exception will apply. Thus, the licensee will be required to prepay only what it can afford and it must return the rest of the spectrum to the Commission for reauction. As with prepayment of full 30 MHz licenses, the exception will not apply if any "new money" is added to make prepayment, and the exception may be applied to only one MTA.

56. We received numerous requests to allow licensees to receive credit for their entire down payment under the disaggregation option.[137] We consider it inadvisable to

[137] *See* Airtel Petition at 1; Alpine Petition at 9; Cellexis Petition at 6; Cellnet Petition at 2; Christensen Petition at 1; ClearComm Petition at 6-18; CVI Wireless Petition at 1; Federal Network Petition at 1; Fox Communications Petition at 1; Koll Petition at 1; Leifer, Marter Petition at 1; Meretel Petition at 3; MFRI Petition at 4; NextWave Petition at 10-15; New Wave Petition at 1; One Stop Wireless Petition at 2; Prime Matrix Petition at 1; RFW Petition at 5; UCNI Petition at 2; URS Greiner Petition at 1; Wireless Nation Petition at 2; ClearComm Opposition at 2-4; Duluth PCS, et al. Opposition at 5- 8; Polycell Opposition at 5-8; Third Kentucky Opposition at 2; ClearComm Reply at 3-6; Hyundai Reply at 4-7; Wireless Ventures Reply at 3; CX Systems *ex parte* filing at 1; Dorne & Margolin *ex parte* filing at 1. *See also* Hyundai Petition at 4-7; Christensen *ex parte* filing at 1; Cyber Sites *ex parte* filing at 1; Florida Power *ex parte* filing at

provide full credit because we believe that to do so would undermine the integrity of the auction process.[138] As the Commission concluded in the *Second Report and Order*, allowing licensees to use their entire down payment would be unfair to those C block licensees electing to continue under the existing installment payment plan and to bidders that were unsuccessful in the auction.[139] We note that we already provide a substantial credit, and we believe that providing any further credit would not be sound public policy. As Fidelity Capital observes, if a licensee "believes the Commission is not providing an attractive disaggregation policy, then it is free to disaggregate its spectrum privately to another qualifying entity."[140]

57. Because numerous benefits are conferred under the disaggregation option, we disagree with NextWave, ClearComm, and other parties that not providing a refund or credit for all of the down payment constitutes a penalty or forfeiture.[141] Under disaggregation, the Commission forgives

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1; Kabbara *ex parte* filing at 1; LaBarge Clayco *ex parte* filing at 1; Leifer, Marter *ex parte* filing at 1; MJA *ex parte* filing at 1; OPM *ex parte* filing at 1; Specialty Teleconstructors *ex parte* filing at 1; Structure Consulting *ex parte* filing at 1; Xway *ex parte* filing at 1.

[138] *See* Communications Act § 309(j), 47 U.S.C. § 309(j).

[139] *Second Report and Order*, 12 FCC Rcd at 16,468 para. 65; *see also* Sprint Opposition at 4-5.

[140] Fidelity Capital Opposition at 4-5 (the present terms of the disaggregation option are fair). *But see* ClearComm Reply at 7 (Fidelity Capital's argument favoring private disaggregation overlooks the fact that the Commission can more efficiently redistribute the disaggregated spectrum).

[141] NextWave Petition at 10-15 (no rational basis exists for the penalty because no rule has been violated and no default or bid withdrawal has occurred); ClearComm Petition at 6-18 (there is no equitable or legal

up to half of a licensee's outstanding debt, an action that will facilitate investment and growth by making more funds available to licensees for build-out. In addition, the Commission provides low-cost, long-term financing for the retained spectrum. Furthermore, the Commission renders a valuable service by providing an efficient and cost-effective mechanism for transferring spectrum that licensees otherwise might have been forced to resell in the secondary market at great risk. In exchange, the Commission receives the disaggregated spectrum and retains a portion of the down payment applicable to that spectrum. Therefore, retention of part of the down payment is not a penalty; rather, it is the fair and reasonable price for receiving the benefits of disaggregation.

58. We are not persuaded that we should add even greater flexibility to the disaggregation option. We decline to adopt MFRI's suggestion that we allow C block licensees to retain the 15 MHz of spectrum adjacent to the F block if they also hold the F block license for the same BTA.[142] Allowing certain C block licensees to disaggregate a different portion of spectrum would create a patchwork pattern of spectrum blocks in the reauction and would limit the opportunity for F block licensees to aggregate larger spectrum blocks by bidding on contiguous spectrum in the reauction. To promote consistency and simplicity in the reauction, we also reject

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justification for the penalty because disaggregating licensees willingly surrender a *pro rata* portion of spectrum); ClearComm Reply at 2-6 (by imposing a penalty on disaggregating licensees, the Commission's action is inconsistent with that of a reasonable commercial lender). *See, e.g.*, Cellexis Petition at 6; Hyundai Petition at 4-7; Meretel Petition at 3; MFRI Petition at 4; New Wave Petition at 2; ClearComm Opposition at 2-4; Duluth PCS, et al. Opposition at 5- 8; Polycell Opposition at 5-8; Hyundai Reply at 4-7.

[142] MFRI Petition at 6.

McBride's request that we allow licensees the choice to disaggregate 10, 15, or 20 MHz of spectrum.[143] Allowing licensees to disaggregate different pieces of spectrum would create inefficiency in the market and would limit the potential for aggregation, thereby decreasing the value of spectrum in the reauction and delaying service to the public. Finally, we disagree with Alpine and Urban Communicators that disaggregation should be permitted on a BTA-by-BTA basis, rather than on an MTA-by-MTA basis.[144] As AirGate notes, disaggregation on an MTA-by-MTA basis will promote participation in the reauction because licensees are prohibited from selectively retaining 30 MHz of spectrum in only the most desirable BTAs.[145]

59. NextWave and Cellexis argue that the build-out

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[143] McBride Petition at 5. In addition, McBride claims that, by allowing the entry of more competitors through disaggregation, the Commission has frustrated expectations that a maximum of six PCS licenses would exist in each market (one each for blocks A through F). *Id.* at 2. McBride's argument is misplaced because Section 24.714 of the Commission's rules permit broadband PCS licensees in blocks A through F to disaggregate any amount of spectrum through the marketplace to qualified entities. 47 C.F.R. § 24.714. Moreover, it has always been the Commission's goal to encourage the widest participation in the wireless market, in accordance with Congress' mandate. *See* Communications Act § 309(j)(3)(B), 47 U.S.C. § 309(j)(3)(B).

[144] Alpine Petition at 9; Urban Communicators Petition at 9. Alpine offers no rationale for a BTA-by-BTA requirement, and Urban Communicators makes an unpersuasive claim that an MTA-by-MTA requirement provides little relief for licensees that hold licenses in only one MTA. A licensee disaggregating spectrum in its only MTA would receive all the benefits of disaggregation, including the forgiveness of half its outstanding debt.

[145] AirGate Opposition at 14-15; *see also Second Report and Order*, 12 FCC Rcd at 16,455 para. 38.

exception permitted under the amnesty option should be extended to licensees selecting the disaggregation option.[146] Under our modified approach, a build-out exception is unnecessary because licensees have the flexibility to determine which MTAs to retain and which to surrender. Nonetheless, as stated in the *Second Report and Order*, a build-out exception was never needed under the disaggregation option because, unlike the original amnesty option, the disaggregation option was never an "all-or-nothing" proposition.[147] Under the original amnesty option, a licensee was required to surrender all licenses except for those in MTAs in which it satisfied the build-out requirement. By comparison, disaggregation was permitted on an MTA-by-MTA basis, and so licensees were never compelled to disaggregate spectrum in all their MTAs.

60. Finally, we affirm the statement in the *Second Report and Order* that upon acceptance of the election notice, the disaggregated spectrum will be deemed returned to the Commission.[148] Further, after disaggregation, notwithstanding the fact that a disaggregating licensee will continue to hold in its possession a 30 MHz license, that license will no longer authorize use of the 15 MHz of spectrum that is surrendered to the Commission but will continue to be valid with respect to the 15 MHz of spectrum

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[146] NextWave Petition at 15-16; Cellexis Petition at 6. In addition, a number of parties argue generally that licensees should be allowed to retain licenses in which they have made significant build-out. See Airtel Petition at 1; Christensen Petition at 1; CVI Wireless Petition at 1; Koll Petition at 1; Leifer, Marter Petition at 1; URS Greiner Petition at 1; Dorne & Margolin *ex parte* filing at 1.

[147] *Second Report and Order*, 12 FCC Rcd at 16,455 para. 38.

[148] *Id.*, 12 FCC Rcd at 16,470 para. 73.

that is retained.

IX. ELECTION PROCEDURES

A. Background

61. In the *Second Report and Order*, the Commission established January 15, 1998, as the deadline for C block licensees to elect to continue under the existing installment payment plan or to elect one of the three alternative options.[149] The Commission also required, inter alia, C block licensees whose elections would necessitate ongoing payments to execute any necessary financing documents pursuant to appropriate requirements and time frames established by the Bureau. The Commission specified procedures to be followed by licensees electing to continue under their existing notes or electing disaggregation, amnesty, or prepayment.

62. On January 7, 1998, we changed the election date to February 26, 1998, in order to allow licensees to submit their elections after final disposition of arguments raised on reconsideration.[150] On February 24, 1998, we issued an order changing the election date to 60 days after publication of this Order on Reconsideration in the *Federal Register*.[151]

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[149] *Id.*, 12 FCC Rcd at 16,470 para. 70.

[150] *Election Date Order I* at para. 2.

[151] *Election Date Order II*.

B. Discussion

63. Moving the election date was an appropriate action given the large number of petitions for reconsideration filed in this proceeding. The revised deadline has provided sufficient time for us to respond to arguments raised on reconsideration so that licensees can be assured of regulatory certainty before making their elections. The postponement satisfies the requests of several parties that the date be delayed.[152] We deny, however, other requests for a still longer postponement.[153] Licensees already have had several months in which to consider the options under the *Second*

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[152] *See, e.g.*, Horizon Petition at 2 (requesting that the election deadline be moved to March 15, 1998); MFRI Opposition at 2; Third Kentucky Opposition at 2; RFW *ex parte* filing at 1-2. *But see* AirGate Opposition at 15-16 (the January 15, 1998, election date should be maintained).

[153] *See* NextWave Petition at 19-22 (before requiring licensees to make an election, the Commission should resolve control group issues, clarify the role of the Department of Justice, and adopt final World Trade Organization implementation rules); Polycell Opposition at 4-5 (same as NextWave); Duluth PCS, et al. Opposition at 4-5 (same as NextWave); Omnipoint Petition at 13-14 (before licensees relinquish valuable spectrum assets, the Commission should clarify its position on bankruptcy and its jurisdiction to engage in debt forgiveness); Omnipoint Opposition at 13-14 (before licensees are required to make irreversible elections, the Commission should issue final decisions on the note interest rate, the procedures for implementing resumption of payments, election filing procedures, the Commission's position on bankruptcy, and the role of the Department of Justice). MFRI asks that the election date be postponed until the bid signaling practices in the D, E, and F block auction have been resolved. MFRI Petition at 3. We note that on September 5, 1997, the Commission announced the implementation of click-box bidding, one purpose of which is to prevent bid signaling practices. See "FCC Announces Changes to Auction Procedures for the 800 MHz SMR Auction (Auction No. 16)," *Public Notice*, 12 FCC Rcd 13,449 (WTB 1997).

Report and Order, and we believe that 60 days after publication in the *Federal Register* will provide sufficient time for any reevaluation that may be necessary in light of the modifications we make in this *Order*.[154]

64. We disagree with Omnipoint that NextWave should be required to make its election in advance of other C block licensees.[155] Omnipoint claims that NextWave is so dominant in the market that its election decision will have a dramatic impact on the relative value of choices made by the other licensees.[156] Omnipoint argues that, for example, other licensees might be reluctant to surrender spectrum if they knew NextWave was keeping its spectrum because reauction opportunities would be severely limited without the return of any NextWave licenses.[157] We agree with NextWave that all C block licensees should be treated equally, and we will not discriminate against one licensee in order to grant others a competitive advantage.[158]

65. In the *Second Report and Order*, the Commission inadvertently omitted reference to the requirement that F block licensees execute fully and deliver timely all necessary financing documents. Consequently, we now clarify that F block licensees, as well as C block licensees, must execute and deliver all necessary financing documents pursuant to

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[154] *See* Northern Michigan Petition at 10 (the election date should be at least 60 days after the release of the order on reconsideration of the *Second Report and Order*).

[155] Omnipoint Petition at 6-8; Omnipoint Reply at 2-5.

[156] Omnipoint Petition at 6.

[157] *Id.* at 7-8.

[158] NextWave Opposition at 2.

appropriate requirements and time frames as will be established by the Bureau in a forthcoming public notice on procedures. We modify the *Second Report and Order* to require both C and F block licensees that fail to execute fully and deliver timely to the Commission any required financing documents to pay on the payment resumption date all unpaid simple interest accruing from the date of license grant through the payment resumption date.[159] The Bureau's forthcoming public notice also will set forth updated election procedures for C block licensees, reflecting our modifications to the *Second Report and Order*.

X. REAUCTION

A. Timing

66. On January 7, 1998, we announced that the C block reauction would begin on September 29, 1998.[160] In light of the postponement of both the election date and the payment resumption date, as discussed above, it will be necessary to establish a new reauction date. We delegate to the Bureau the authority to establish the reauction date. We instruct the Bureau to issue a public notice announcing the new date at

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[159] *See Second Report and Order*, 12 FCC Rcd at 16,471 para. 76 (requiring payment of all Suspension Interest, which included interest only through the previous payment resumption date of March 31, 1998).

[160] *See Election Date Order I* at para. 3. The Commission has proposed including the following licenses in the reauction: (1) all licenses representing the disaggregated spectrum surrendered to the Commission under the disaggregation option; (2) all licenses surrendered to the Commission by licensees taking advantage of the Commission's prepayment or amnesty options; and (3) all PCS C block licenses currently held by the Commission as the result of previous defaults. *See Further Notice*, 12 FCC Rcd at 16,474 para. 83.

least three months in advance of the start of the reauction.

67. CPCSI, a winning bidder for nine licenses in the C block auction whose license grants were subject to resolution of an Application for Review pending at the time of the release of the *Second Report and Order*, asks the Commission not to begin the reauction until final action on its Application for Review or, in the event no such action occurs, until the Pocket and GWI bankruptcy proceedings conclude.[161] Because the Commission granted CPCSI's Application for Review on December 24, 1997,[162] CPCSI's request is moot and there is no need to address the merits of CPCSI's request.

B. Eligibility

1. Background

68. The *Second Report and Order* specified that all entrepreneurs, all entities that had been eligible for and had participated in the original C block auction, and all current C block licensees would be eligible to bid in the reauction.[163] The Commission, however, created an exception for

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[161] CPCSI Petition at 4-9. *But see* AirGate Opposition at 16 (encouraging the Commission to reject CPCSI's Application for Review in time for those licenses to be included in the reauction and arguing that the reauction should not be delayed by the bankruptcy proceedings).

[162] *See* Carolina PCS I Limited Partnership Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding BTA Nos. B016, B072, B091, B147, B177, B178, B312, B335, and B436, Frequency Block C, *Memorandum Opinion and Order*, FCC 97-417 (released December 24, 1997).

[163] *Second Report and Order*, 12 FCC Rcd at 16,448 para. 22; *see also Further Notice*, 12 FCC Rcd at 16,474 para. 84.

incumbent licensees: for a period of two years from the start date of the reauction, C block licensees (defined as qualifying members of the licensee's control group, and their affiliates) that opted for the disaggregation or prepayment options would be prohibited from reacquiring, either through the reauction or through any secondary market transaction, any spectrum or licenses that they surrendered to the Commission under those options.[164] Such licensees, however, would be permitted to bid on spectrum or licenses surrendered by other licensees, provided that such licensees were not affiliates.[165] Licensees electing the amnesty option would be eligible to bid for any and all licenses at the reauction, with no restrictions on post- auction acquisitions.[166]

2. Discussion

69. The only reauction eligibility issues set forth in the *Second Report and Order* ripe for reconsideration in this phase of the proceeding are those related directly to whether and how a licensee's election of a particular payment option should affect its eligibility to participate in the reauction of, or reacquire an ownership interest in, surrendered spectrum. We defer to other phases of WT Docket No. 97-82 additional eligibility issues, including the qualifications of entities that have defaulted on payments to participate in the reauction[167] and the use of a "controlling interest" approach rather than

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[164] *Second Report and Order*, 12 FCC Rcd at 16,457, 16,470 paras. 42, 69.

[165] *Id.*, 12 FCC Rcd at 16,457 para. 42; *see also id.*, 12 FCC Rcd at 16,470 para. 69.

[166] *Id.*, 12 FCC Rcd at 16,462 para. 54.

[167] Comment is sought on this issue in the *Further Notice*, 12 FCC Rcd at 16,474 para. 84.

"control group" structures to determine financial size in the C block, as well as in all auctionable services.[168] We note that, in its comments filed in response to the *Further Notice*, Nextel Communications, Inc. challenges the Commission's ruling in the *Second Report and Order* that participation in the C block reauction is limited to qualified entrepreneurs.[169] In their petitions for reconsideration, Cellexis and RFW respond to Nextel's arguments and urge the Commission not to reconsider its decision.[170] We address Nextel's challenge here, notwithstanding the fact that Nextel's request was not filed as a petition for reconsideration of the *Second Report and Order*. We conclude that Nextel has not provided a convincing rationale for deviating from the public interest goals articulated by the Commission in the *Second Report and Order*.[171] Consequently, we affirm the Commission's earlier ruling to limit eligibility for participation in the reauction to applicants meeting the current definition of

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[168] NextWave Petition at 20; *accord* Duluth PCS, et al. Opposition at 4-5; Polycell Opposition at 4-5; *cf.* AmeriCall Opposition at 7-8 (arguing that the 10 percent control group institutional investor rule, 47 C.F.R. § 24.709(b)(5)(i)(C), and the 25 percent nonattributable ownership limit, 47 C.F.R. § 24.709(b)(3)(i), should be eliminated because they unnecessarily restrict access to capital from noncontrolling investors). Comment is sought on this issue in *Part I Third Report and Order*; *see also* Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding, WT Docket No. 97-82, *Order, Memorandum Opinion and Order and Notice of Proposed Rule Making*, 12 FCC Rcd 5686, 5693 n.17, 5703 paras. 11, 28 (1997).

[169] *See* Comments filed by Nextel Communications, Inc. on November 13, 1997 at 7-9.

[170] *See* Cellexis Petition at 7-8; RFW Petition at 6-7. *See also* MFRI Reply at 6-7 (expressing concern that large incumbents advocate opening the C block reauction to all bidders); Wireless Ventures Reply at 4 (same).

[171] *See Second Report and Order*, 12 FCC Rcd at 16,448 para. 22.

"entrepreneur."[172]

70. On reconsideration, we make a change to the eligibility requirements, which already has been discussed above, and also a clarification. As we stated previously, a licensee that elects the amnesty option for an MTA and opts to receive partial credit for down payments on its returned licenses in that MTA will not be eligible to reacquire those licenses through either reauction or any secondary market transaction for a period of two years from the start date of the reauction. This restriction also applies to the licensee's affiliates. Likewise, if a licensee disaggregates an MTA, neither it nor its affiliates may bid on the returned spectrum in the reauction or reacquire it through a secondary market transaction for two years after the start date of the reauction. Licensees that return licenses under the amnesty option or spectrum under the disaggregation option are not precluded from bidding in the reauction on licenses or spectrum returned by other non-affiliated licensees (or from later reacquiring those licenses or spectrum in post-auction transactions). We clarify that the term "affiliate" is defined by our competitive bidding rules in the *Part I Third Report and Order*.[173]

71. Several parties believe that we should revise our bidding eligibility requirements.[174] Sprint, for example,

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[172] *Id.*

[173] 47 C.F.R. § 1.2110(b)(4); *Part I Third Report and Order* at paras. 29-30.

[174] *Compare* Northern Michigan Petition at 6 (licensees electing disaggregation should be allowed to participate in the reauction) and Cellexis Petition at 6 (the C block reauction should be open to all non-defaulting C block licensees, irrespective of the chosen option) *with*

agrees with the Commission's decision to exclude C block licensees that choose disaggregation or prepayment from bidding on their surrendered spectrum at reauction, but contends that the Commission undermines the integrity of the auction process by not similarly limiting the ability of licensees that select the amnesty option.[175] Sprint believes that the lack of such a restriction will unjustly enrich licensees that select the amnesty option and then bid for the same spectrum at a likely discount.[176] NextWave, on the other hand, claims it is unreasonably discriminatory to preclude entities choosing disaggregation or prepayment from reacquiring their surrendered spectrum for two years while allowing entities choosing the amnesty option to reacquire their spectrum immediately either by reauction or through secondary markets.[177]

72. We believe our modified approach addresses both these arguments. In response to NextWave, we note that licensees electing disaggregation and/or prepayment for one MTA now can choose to return licenses in other MTAs and bid on those licenses in the reauction. However, in response to Sprint, we point out that licensees electing amnesty for an MTA must forgo their entire down payment if they wish to bid on their returned licenses for that MTA. We believe that this cost sufficiently mitigates any concern of unjust enrichment.

Antigone/Devco Opposition at 5-6 (bidders electing any of the special relief options should be barred from participating in any future C block reauctions).

[175] Sprint Petition at 3-4.

[176] *Id.* at 2-3; Sprint Opposition at 3.

[177] NextWave Petition at 18-19; *accord* Polycell Opposition at 8-9; Duluth PCS, et al. Opposition at 8-9.

XI. MISCELLANEOUS MATTERS

A. Cross Defaults

73. The *Second Report and Order* provided that if a licensee defaulted on a C block license, the Commission would not pursue cross default remedies with regard to the licensee's other licenses in the C or F blocks.[178] In other words, if a licensee defaulted on a given C block license but was meeting its payment obligations on its other C or F block licenses, the Commission would not declare the licensee to be in default with respect to those other C or F block licenses.[179] We disagree with CIRI that, by not imposing cross default remedies, we encourage auction participants to bid speculatively and then "cherry-pick" among the licenses they ultimately decide to keep by simply defaulting on the ones they no longer desire.[180] As explained earlier, we have implemented numerous procedures to safeguard against "cherry-picking." Moreover, we believe that by not imposing cross default remedies, we encourage regional financing. Even if a licensee's holdings in one region have proven unattractive to the financial market, the same licensee's holdings in other markets may be financially sound. Therefore, we will not depart from the decision in the *Second Report and Order*. We note that licensees that ultimately default will continue to be subject to debt collection procedures.[181]

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[178] *Second Report and Order*, 12 FCC Rcd at 16,472-73 para. 79.

[179] *Id.*

[180] *See* CIRI Petition at 6-8. *But see* AmeriCall Opposition at 8-11 ("Suffering default penalties is not an encouragement to 'cherry-pick.'").

[181] 47 C.F.R. § 1.2110(f)(4)(iv).

B. No Extension of C Block Relief to Other Licensees

74. We reject various requests to grant F block licensees the same relief provided to C block licensees.[182] Cellular Holding contends that C and F block licensees should be treated similarly because: (1) both are licensed to provide broadband PCS; (2) they were granted their licenses within 7.5 months of one another; (3) Section 24.709 of the Commission's rules governs bidder eligibility for both blocks; (4) their market boundaries are identical; (5) they will have nearly the same amount of spectrum if C block licensees choose disaggregation; and (6) they both compete with larger, more experienced competitors that received a head-start.[183] Cellular Holding, however, ignores the fact that C and F block licensees are not similarly situated with respect to the most relevant factor -- the need for financial relief.

75. After careful review, the Commission determined in the *Second Report and Order* that "the nature and extent of any financing difficulties faced by the C block licensees appear to be different from any such problems facing entrepreneurs in the F block."[184] C block prices were higher, on average, than F block prices.[185] We disagree with several parties that argue

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[182] Central Oregon Petition at 2-4; Cellular Holding Petition at 2-5; Duluth PCS, et al. Opposition at 10; Polycell Opposition at 10; Eldorado Reply at 2-4.

[183] Cellular Holding Petition at 2-3.

[184] *Second Report and Order*, 12 FCC Rcd at 16,447 para. 20.

[185] *See* "D/E/F Band PCS Auction Results in Lower Spectrum Prices But Another Win for CDMA Proponents," U.S. Telecommunications, SBC Warburg Inc. (January 28, 1997) (D, E, and F spectrum prices 75 percent lower than C band auction); Donaldson, Lufkin & Jenrette, The Wireless Communications Industry (Spring 1997) at 20 ("D, E and F Auction Prices

that the Commission's explanation in the *Second Report and Order* fails to justify disparate treatment.[186] The difficulties in financing the unexpectedly high prices bid in the C block auctions is a sufficiently distinguishing basis for limiting relief to C block licensees. As further justification, we agree with AmeriCall that the C block situation was the result of a unique set of mostly unpredictable events, including litigation and resulting licensing delays and the lack of a simultaneous non-entrepreneur auction that could have been used to ease price pressures.[187]

76. The need for C block relief was due to exceptional and urgent circumstances, and because it is essential to maintain the integrity of the auction process, only the most exigent situation would cause us to offer such relief. Even in addressing the C block financing situation, the Commission provided options that offered only limited relief so as to be fair to bidders that withdrew from the auction. We therefore are not persuaded by Central Oregon's claim that F block licensees should be granted relief because A, B, and C block licensees have a competitive advantage given their earlier licensing date and their larger amounts of spectrum.[188] We also reject Omnipoint's argument that C block options should be available to entrepreneurs with D, E, and F block licenses because C block relief will change the relative values of those licenses.[189] These arguments do not present sufficiently

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Surprisingly Low").

[186] *See* Central Oregon Petition at 2-4; Omnipoint Opposition at 12; Eldorado Reply at 3-4.

[187] AmeriCall Opposition at 3-4. *See also* NextWave Reply at 3.

[188] Central Oregon Petition at 2-4.

[189] Omnipoint Petition at 9-10; Omnipoint Opposition at 11-12.

compelling reasons to apply the "extraordinary procedures" we adopted for C block licensees to D, E, and F block licensees.[190] In addition, CONXUS, the only party to address this issue, argues that narrowband PCS entities should receive relief comparable to that afforded C block licensees because they compete in the same consumer and financial markets and face similar circumstances.[191] The record in this reconsideration proceeding is insufficient to adopt global changes effecting narrowband PCS entities, but we note that payment matters for these entities are currently being examined in another proceeding before the Commission.[192]

C. Issues Addressed in Other Proceedings or Requiring Action by Congress

77. A number of parties make requests involving issues either that will be, or have been, addressed in other proceedings or that require action by Congress. For example, several petitioners urge the Commission to reduce the interest rate for C block installment payments.[193] The Bureau will

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[190] *Second Report and Order*, 12 FCC Rcd at 16,437-38 para. 2.

[191] CONXUS Petition at 3-5; CONXUS Opposition at 2-8; CONXUS Reply at 4-10. CONXUS claims its experience is similar to the C block situation, including delays in market entry, its problems in raising capital, high bid amounts, a post-auction rule change, and the lack of a simultaneous non-entrepreneur auction.

[192] *See* Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Narrowband PCS, PP Docket No. 93-253, *Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 12,972 (1997).

[193] Northern Michigan Petition at 8-9 (interest rate for C block licensees should be standardized at 6.5 percent); Alpine Petition at 11-12 and Alpine Reply at 6-8 (interest rate should be reduced to 5.56 percent); McBride Petition at 4 (the Commission should set the interest rate uniformly

address this issue in a forthcoming order. With respect to Northern Michigan's request that we allow commercial lenders to acquire a security interest in licenses, we note that we previously resolved the issue in another proceeding.[194]

78. TAP encourages the Commission to seek Congressional authority to award tax certificates to entities that provide investment capital to C block licensees.[195] Section 309(j)(4)(D) of the Communications Act mandates that, in seeking to ensure that designated entities are "given the opportunity to participate in the provision of spectrum-based services," the Commission shall "consider the use of tax certificates."[196] By allowing a tax deferral of the gain realized on an investment, tax certificates provide a significant means of enhancing the value of an investment in an enterprise, and we believe that a tax certificate program for spectrum-based services would be as beneficial to the wireless industry as the Commission's tax certificate programs were for the broadcast and cable industries.[197] However, in view of Congress' repeal

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at 5.75 percent).

[194] Northern Michigan Petition at 8. *See also* McBride Petition at 4. Our position on this issue was addressed in Amendment of Part I of the Commission's Rules -- Competitive Bidding Proceeding, WT Docket No. 97-82, *Order, Memorandum Opinion and Order and Notice of Proposed Rule Making*, FCC 97-60 (released February 28, 1997) at para. 12 ("debtors may grant to other parties a subordinated security interest in the proceeds of an authorized assignment or transfer of the license to a third party, provided however that any such security interest shall be subordinated to and in no way inconsistent with the Commission's security interest in the license").

[195] TAP Reply at 4-10. *See also* McBride Petition at 5.

[196] Communications Act § 309(j)(4)(D), 47 U.S.C. § 309(j)(4)(D).

[197] *See* TAP Reply at 5-6 (citing Erwin G. Krasnow, "A Case for Minority Tax Certificates," Broadcasting & Cable, December 15, 1997, at 80) (the Commission's tax certificate program greatly increased minority

in 1995 of Section 1071 of the IRS Code,[198] which granted the Commission authority to use tax certificates to promote Commission policies, we believe that legislative action would be necessary before we could provide such tax relief. Accordingly, we urge Congress to review the positive impact of the Commission's previous tax certificate programs and to grant us the authority to establish a similar program for wireless enterprises, which we believe would promote competition in the telecommunications industry by encouraging investment in new services.

XII. PROCEDURAL MATTERS AND ORDERING CLAUSES

A. Supplemental Final Regulatory Flexibility Analysis

79. The Supplemental Final Regulatory Flexibility Analysis, pursuant to the Regulatory Flexibility Act, 5 U.S.C. § 604, is attached at Appendix C.

B. Paperwork Reduction Act Analysis

80. This Order contains a modified information collection that was submitted to the Office of Management and Budget requesting emergency clearance under the Paperwork Reduction Act of 1995.

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ownership of broadcast and cable entities and "gave minority entrepreneurs increased access to the market for broadcast and cable properties, gave them a chip at the bargaining table and opened doors at financial institutions that had been closed").

[198] Pub. L. No. 104-7, § 2, 109 Stat. 93, 93-94 (1995).

C. Ordering Clauses

81. Accordingly, IT IS ORDERED that, pursuant to the authority granted in Sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 309(j), the petitions for reconsideration filed in response to the *Second Report and Order* are GRANTED IN PART and DENIED IN PART, as provided herein.

82. IT IS FURTHER ORDERED that, pursuant to the authority granted in Sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 309(j), the modifications to the Commission's rules, as described herein and in Appendix B, ARE HEREBY ADOPTED. These modifications shall become effective 60 days after publication of this Order on Reconsideration of the *Second Report and Order* in the *Federal Register*.

83. IT IS FURTHER ORDERED that, pursuant to 47 U.S.C. § 155(c) and 47 C.F.R. § 0.331, the Chief of the Wireless Telecommunications Bureau IS GRANTED DELEGATED AUTHORITY to prescribe and set forth procedures for the implementation of the provisions adopted herein.

84. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this Order on Reconsideration of the *Second Report and Order*, including the Supplemental Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A

Petitions for Reconsideration

1. Airtel Communications, Inc. ("Airtel")
2. Alpine PCS, Inc. ("Alpine")
3. AmeriCall International, L.L.C. ("AmeriCall")
4. Carolina PCS I Limited Partnership ("CPCSI")
5. Cellexis International, Inc. ("Cellexis")
6. Cellnet ("Cellnet")
7. Cellular Holding, Inc. ("Cellular Holding")
8. Central Oregon Cellular, Inc. ("Central Oregon")
9. Christensen Engineering & Surveying ("Christensen")
10. ClearComm, L.P. ("ClearComm")
11. CONXUS Communications, Inc. ("CONXUS")
12. Cook Inlet Region, Inc. ("CIRI")
13. CVI Wireless
14. DiGiPH PCS, Inc. ("DiGiPH")
15. Federal Network
16. Fox Communications
17. General Wireless, Inc. ("GWI")
18. Horizon Personal Communications, Inc. ("Horizon")
19. Hyundai Electronics America ("Hyundai")
20. Koll Telecommunication Services ("Koll")
21. Leifer, Marter Architects ("Leifer, Marter")
22. McBride, Vincent ("McBride")
23. Meretel Communications, L.P. ("Meretel")
24. MFRI Incorporated ("MFRI")
25. NextWave Telecom Inc. ("NextWave")
26. New Wave Inc. ("New Wave")
27. Northern Michigan PCS Consortium L.L.C. and Wireless 2000, Inc. ("Northern Michigan")
28. Omnipoint Corporation ("Omnipoint")

29. One Stop Wireless of America, Inc. ("One Stop Wireless")
30. OnQue Communications, Inc. ("OnQue")
31. Prime Matrix Wireless Communications ("Prime Matrix")
32. RFW PCS Inc. ("RFW")
33. Sprint Corporation ("Sprint")
34. United Calling Network, Inc. ("UCNI")
35. Urban Communicators PCS Limited Partnership ("Urban Communicators")
36. URS Greiner, Inc. ("URS Greiner")
37. Wireless Nation, Inc. ("Wireless Nation")

Oppositions

1. AirGate Wireless, L.L.C. ("AirGate")
2. ALLTEL Communications, Inc. ("ALLTEL")
3. AmeriCall International, L.L.C. ("AmeriCall")
4. Antigone Communications Limited Partnership and PCS Devco, Inc. ("Antigone/Devco")
5. AT&T Wireless Services, Inc. ("AT&T")
6. ClearComm, L.P. ("ClearComm")
7. CONXUS Communications, Inc. ("CONXUS")
8. Duluth PCS, Inc., St. Joseph PCS, Inc., and West Virginia PCS, Inc. ("Duluth PCS, et al.")
9. Fidelity Capital
10. MFRI Incorporated ("MFRI")
11. NextWave Telecom Inc. ("NextWave")
12. Northcoast Communications, L.L.C. ("Northcoast")
13. Omnipoint Corporation ("Omnipoint")
14. Polycell Communications, Inc. ("Polycell")
15. PrimeCo Personal Communications, L.P. ("PrimeCo")
16. Sprint Corporation ("Sprint")
17. Third Kentucky PCS "Third Kentucky")

Replies to Oppositions

1. Alpine PCS, Inc. ("Alpine")
2. Cellexis International, Inc. ("Cellexis")
3. ClearComm, L.P. ("ClearComm")
4. CONXUS Communications, Inc. ("CONXUS")
5. CX Systems Int'l, Inc. ("CX Systems")
6. Eldorado Communications, L.L.C. ("Eldorado")
7. Federal Network
8. Frontier Corporation ("Frontier")
9. Hyundai Electronics America ("Hyundai")
10. MFRI Incorporated ("MFRI")
11. NextWave Telecom Inc. ("NextWave")
12. Omnipoint Corporation ("Omnipoint")
13. RFW PCS Inc. ("RFW")
14. Telecommunications Advocacy Project ("TAP")
15. Third Kentucky Cellular Corp. ("Third Kentucky")
16. Wireless Ventures, Inc. ("Wireless Ventures")

Ex Parte Filings

1. AirGate Wireless, L.L.C. ("AirGate"), February 9, 1998
2. AmeriCall International, L.L.C. ("AmeriCall"), March 12, 1998
3. Christensen Engineering & Surveying ("Christensen"), December 19, 1997
4. ClearComm, L.P. ("ClearComm"), February 23, 1998
5. ClearComm, L.P. ("ClearComm"), March 13, 1998
6. Congressman Gary L. Ackerman, January 15, 1998
7. Congressman Xavier Becerra, February 3, 1998
8. Congresswoman Sue W. Kelly, December 31, 1997
9. Congressman Albert R. Wynn, February 9, 1998
10. CX Systems Int'l, Inc. ("CX Systems"), December 10, 1997

11. Cyber Sites, L.L.C. ("Cyber Sites"), December 1, 1997
12. Datacomm Research Company, February 20, 1998
13. Dorne & Margolin, December 1, 1997
14. Florida Power Corporation ("Florida Power"), December 19, 1997
15. Gilder Technology Group, Inc., February 16, 1998
16. Joint filing by 43 companies, February 20, 1998
17. Kabbara Engineering ("Kabbara"), December 26, 1997
18. LaBarge Clayco Wireless, L.L.C. ("LaBarge Clayco"), December 24, 1997
19. Leifer, Marter Architects ("Leifer, Marter"), December 17, 1997
20. Members of the Congressional Hispanic Caucus, February 5, 1998
21. MJA Communications Corp. ("MJA"), December 22, 1997
22. New Wave Inc. ("New Wave"), January 20, 1998
23. New Wave Inc. ("New Wave"), February 17, 1998
24. NextWave Telecom Inc. ("NextWave"), January 21, 1998
25. OPM USA, Inc. ("OPM"), December 23, 1997
26. Praxis Telecom, January 26, 1998
27. Prudential Securities Inc., February 26, 1998
28. R&S PCS, Inc., February 11, 1998
29. RFW PCS Inc. ("RFW"), December 23, 1997
30. Senator Barbara Boxer, February 13, 1998
31. Senators Richard H. Bryan and Harry Reid, January 29, 1998
32. Senator Thomas Daschle, February 11, 1998
33. Senator J. Robert Kerrey, February 12, 1998
34. Specialty Teleconstructors Inc. ("Specialty Teleconstructors"), December 19, 1997
35. Structure Consulting Group ("Structure Consulting"), December 22, 1997

36. Wireless Nation, Inc. ("Wireless Nation"), January 23, 1998
37. Xway, Inc. ("Xway"), December 16, 1997
38. 2001 Personal Communication, Inc., January 8, 1998

APPENDIX B

Revised Rules

Part 1 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 1 - PRACTICE AND PROCEDURE

1. The authority citation for Part 1 continues to read as follows:

Authority: 15 U.S.C. 79 et seq.; 47 U.S.C. 151, 154(i), 154(j), 155, 225, and 303(r), unless otherwise noted.

2. Section 1.2110 is amended by revising paragraph (f)(4)(ii), (iii), (iv) to read as follows:

§ 1.2110 Designated Entities

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(f) ***

(4) ***

(i) ***

(ii) If any licensee fails to make the required payment at the close of the 90-day period set forth in subsection (i) above, the licensee will automatically be provided with a subsequent 90-day grace period, except that no subsequent automatic grace period will be provided for payments from C or F block licensees that are not made within 90 days of the payment resumption date for those licensees, as explained in

Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Order on Reconsideration of the Second Report and Order*, WT Docket No. 97-82, FCC 98-46 (rel. Mar. 24, 1998). ***

(iii) If an eligible entity making installment payments is more than one hundred and eighty (180) days delinquent in any payment, it shall be in default, except that C and F block licensees shall be in default if their payment due on the payment resumption date, referenced in subsection (ii) above, is more than ninety (90) days delinquent.

(iv) Any eligible entity that submits an installment payment after the due date but fails to pay any late fee, interest or principal at the close of the 90-day non-delinquency period and subsequent automatic grace period, if such a grace period is available, will be declared in default, its license will automatically cancel, and will be subject to debt collection procedures.

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Part 24 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 24 - PERSONAL COMMUNICATIONS SERVICES

3. The authority citation for Part 24 continues to read as follows:

Authority: 47 U.S.C. 154, 301, 302, 303, 309 and 332, unless otherwise noted.

4. Section 24.709 is amended by revising paragraph (b)(9)(i), (ii) (A) - (B) to read as follows:

§ 24.709 Eligibility for licenses for frequency Blocks C and F.

(a) ***

(b) ***

(9) *Special rule for licensees disaggregating or returning certain spectrum in frequency block C.*

(i) In addition to entities qualifying under this section, any entity that was eligible for and participated in the auctions for frequency block C, which began on December 18, 1995, and July 3, 1996, will be eligible to bid in a reauction of block C spectrum surrendered pursuant to Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Second Report and Order and Further Notice of Proposed Rule Making*, WT Docket No. 97-82, 12 FCC Rcd 16,436 (1997), as modified by the *Order on Reconsideration of the Second Report and Order*, WT Docket No. 97-82, FCC 98-46 (rel. Mar. 24, 1998).

(ii) The following restrictions will apply for any reauction of frequency block C spectrum conducted after March 24, 1998:

(A) Applicants that elected to disaggregate and surrender to the Commission 15 MHz of spectrum from any or all of their frequency block C licenses, as provided in Amendment of the Commission's Rules Regarding Installment Payment

Financing for Personal Communications Services (PCS) Licensees, *Second Report and Order and Further Notice of Proposed Rule Making*, WT Docket No. 97-82, 12 FCC Rcd 16,436 (1997), as modified by the *Order on Reconsideration of the Second Report and Order*, WT Docket No. 97-82, FCC 98-46 (rel. Mar. 24, 1998), will not be eligible to apply for such disaggregated spectrum until 2 years from the start of the reauction of that spectrum.

(B) Applicants that surrendered to the Commission any of their frequency block C licenses, as provided in Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Second Report and Order and Further Notice of Proposed Rule Making*, WT Docket No. 97-82, 12 FCC Rcd 16,436 (1997), as modified by the *Order on Reconsideration of the Second Report and Order*, WT Docket No. 97-82, FCC 98-46 (rel. Mar. 24, 1998), will not be eligible to apply for the licenses that they surrendered to the Commission until 2 years from the start of the reauction of those licenses if they elected to apply a credit of 70% of the down payment they made on those licenses toward the prepayment of licenses they did not surrender.

(C) ***

* * * APPENDIX C OMITTED * * *

Statement of Commissioner Susan Ness Concurring in Part, Dissenting in Part

Re: Amendment of the Commission's Rules Regarding Installment Payment Financing for C block Personal Communications Service (PCS) Licensees, WT Docket No. 97-82

I concur in today's decision to the extent it affirms the Commission's decision of September 25, 1997, and dissent to the extent it does not. I am pleased that the majority has generally adhered to the framework established last fall. But I do not support the revised package of options being afforded to C block licensees, which I believe is an excessive and potentially counterproductive government intervention in the marketplace. In addition, I am troubled by the majority's willingness to indefinitely delay reauction of returned licenses.

My disagreements with the majority are real, and they are substantial, but they are also respectful. As with many of the judgments the Commissioners are called upon to make, reasonable people can disagree. So here.

Although I supported the Commission's prior decision, I have welcomed the opportunity to think anew on these issues. Reconsideration presents an opportunity -- and a duty -- to consider the matter with a fresh eye. I have used the reconsideration process to test the facts and logic undergirding the Commission's prior decision, to seek additional information and ideas, and to deliberate with a new group of colleagues who bring diverse backgrounds and fresh insights to the process.

And yet this process has left unshaken the core convictions that were central to my thinking last September. Spectrum auctions cannot achieve their full promise as a method of assigning rights to use the public airwaves if, after the fact, government interposes itself into the marketplace to alter market outcomes and favor one group of competitors over another group of competitors.

It remains my view that the C block auction, like the other spectrum auctions the Commission has administered, was run fairly. At the time of the auction, the playing field was level. Everyone believed they were playing by the same rules. Each bidder was on notice to take our rules into consideration when they bid, including the installment terms. Every bid, by every bidder, was entirely voluntary.

As prices rose, some bidders dropped out, believing that others were misjudging the market, and banked on the opportunity to obtain licenses in the event of defaults, license cancellation, and reauction -- the way the FCC said it would work. Others, judging the market potential differently, stayed in. The FCC owes an equal duty to all of these bidders. In my view, today's decision breaches that duty.

In September, we departed in a limited fashion from strict adherence to market mechanisms, and the majority has now moved further down the slippery slope. In the wake of today's decision, we can reasonably anticipate that these licensees, or those in other spectrum blocks, will seek other accommodations on future occasions. This is the inevitable result when government too readily intervenes to protect market participants from failure.

The real damage here is to our role as steward of the public

airwaves. Our responsibilities are to facilitate use of the spectrum to bring competitive services to the public, to be fair to all parties (licensees and disappointed bidders alike), and to rely on marketplace forces rather than government edict to select winners and losers. Having placed spectrum in an auction with fair rules known to all parties, we should not intrude on the marketplace after the auction for the purpose of assisting some parties to remain licensees. The marketplace is far better suited than we are to determine the capabilities of licensees, and to provide support for those business plans that make economic sense.

Moreover, financial markets need regulatory certainty and predictability of outcomes. Otherwise the regulatory risk is too great to warrant investment. Wall Street needs the C block licensees to get on with business. Our September decision met with some applause, in part because it contributed certainty to the marketplace and allowed participants, equipment manufacturers, and suppliers of venture capital to proceed. The measures the majority takes today regretfully foster more uncertainty and unpredictability.

Specific Concerns

Although the majority has maintained the basic framework of the decision rendered last September, there are fundamental differences between what the Commission did then and what it is doing now. The new approach will entail greater governmental intrusion in the marketplace, more disruption of business plans, and more delays in C block construction and operation.

The options afforded last September were painstakingly tailored to maintain consistency with auction results and to

speed the resumption of normal operation of the market. These options were designed to enable some licensees to exit their predicaments; others to regroup; and still others to refocus their energies on executing their business plan. Given the growing competition in the wireless marketplace, I believed it to be important to enable those C block licensees which were able to do so to "get back to business" as soon as possible. For that reason, one virtue of the options set forth in our September decision was that they were designed to give a modest hand to those most in need, not to create incentives for those licensees capable of proceeding under their original agreements to abandon their business plans.

As noted above, the majority is retaining the basic framework of September's decision, but changing it in significant ways. Today's decision: (1) increases the ability of licensees to credit deposits that otherwise would be forfeit; (2) allows some deposits to be applied against suspension interest; (3) permits licensees to choose among the options on an MTA-by-MTA basis; (4) extends the time when licensees need to either resume their payments or face cancellation of their licenses; and (5) indefinitely postpones the reauction. Taken in combination, the new array of options is complex, confusing, and overly intrusive in the marketplace.

The decision today takes what had been a menu of measured options and turns it into a smorgasbord of hearty choices. The enriched menu of options adopted today may compel all C block licensees to stop and reassess their business plans. Each will now feel obligated to consider whether changing its plans would be more advantageous than proceeding in accordance with the original auction outcome; and many will do so. It is ill-advised and unnecessary to offer new terms that will alter the plans of licensees who were otherwise

prepared to proceed. This has extended the delay in settling the C block, and adds to the uncertainty in the financial markets. And most important, we are interfering with market correction mechanisms that would ensure that C block licenses are held by entrepreneurs financially able to provide service to the public.

Use of Down Payments

Of the changes to the plan adopted last September, I am most troubled by those pertaining to the disaggregation option. Previously, those choosing disaggregation were required to forfeit the down payments associated with the portion of the spectrum that was being returned; now, they may use a portion of these funds.[1] But these funds do not belong to a licensee that cannot meet its commitments -- any more than do those paid for an option to buy land that has lapsed or a downpayment on a car that has been repossessed. Yet the majority allows these funds to be used to pay down principal on the licenses that are kept or, worse, to pay suspension interest.

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[1] The prior decision allowed licensees to redeploy a portion of their down payments only in one limited circumstance -- prepayment. The key considerations that made this approach acceptable to me were that: (1) such licensees were paying the full bid amount on the licenses they retained; and (2) election of this option removed the government entirely from installment payments -- some licenses were fully purchased, and the remaining licenses were returned to the FCC for reauction. The result was that the electing licensee was relieved of suspension interest and all debt owed, in return for purchasing or returning all licenses. The same benefits do not accrue in the disaggregation context, where the licensee continues to receive below-market interest rates and the government continues to administer installment debt.

Using deposits that would otherwise be forfeited to pay suspension interest essentially postpones the time when the licensee's financial ability to construct and operate a service is put to the test. It also is not fair to the licensees who met their obligations and who must raise the money to cover suspension interest payments.

Delays in Resumption of Payments and Reauction

I am also troubled by yet another extensive delay before the date by which licensees will need to resume payments on their licenses. Until such payments are made, the market will not know which licensees are financially viable. The payments already have been suspended for one year. Now, additional time is needed for licensees to sort out their expanded options. At the same time, the grace period for delayed payments is being extended. So we prolong the time during which the licenses will be tied up, with no assurance that the licensees will ultimately be able to finance and construct their systems and provide service to the public.

In addition, I am concerned by the further delay in the timing of the reauction of forfeited licenses. A reauction is needed to put licenses in the hands of those capable of putting them to productive use. It will also create long-awaited opportunities for those designated entities that, in the prior auction, consciously and responsibly chose not to bid more than they could pay. And yet, in today's order, the majority indefinitely postpones the reauction. Last year, we said it would occur in the third quarter of 1998. Just two months ago, the new Commission committed to a date of September 29, 1998. Now, the reauction is deferred until further notice.

Still more delay is inherent in the Commission's inaction on

rules for the C block reauction. These rules were proposed in the same September order that here is under reconsideration and for which the comment period has ended. Yet even though decisions on some issues in that proceeding could affect the elections from among the newly expanded options, the majority has declined to settle those issues today.

Competing Objectives

The agency is caught between conflicting concerns. Everyone agrees, at least as a general principle, that it is vital to maintain the integrity of the auction process. Yet we naturally are drawn to help C block licensees who are facing hardship. Behind the corporate names printed on the licenses and the petitions for relief stand real people -- small business owners, entrepreneurs, individual investors, and others, many of them women and minorities -- facing real problems. I -- like my colleagues -- am drawn to help them.

But it is impossible to fully reconcile a commitment to fair market-driven spectrum assignments with a willingness to change the rules of the game after it has been played. At some point, one objective must prevail over the other. In my judgment, where the objectives collide, the integrity of the process must control, and the desire to help individual players must yield.

If we really believe in assigning spectrum by auctions as authorized by Congress in the Omnibus Budget Reconciliation Act of 1993, and the "procompetitive, deregulatory" paradigm of the Telecommunications Act of 1996, we must accept the reality that some licensees will fail in the marketplace, and that their conditional licenses will need to be canceled and reauctioned, as our rules envisioned.

Such outcomes are painful, but necessary, if the marketplace is to work its magic.

My disagreement with the majority concerns the lengths to which the Commission should go in trying to prevent such outcomes.

Judges and legislators, lawyers and economists -- all speak to the need to promote and protect competition, not competitors. In my opinion, today's decision crosses the line to favor specific competitors over others. I cannot support that result.

Some parties have suggested that the Commission owes a duty to go to extra lengths because the C block licensees are all small business "designated entities." This argument misses the point that, with or without post hoc relief, the C block spectrum will remain exclusively for designated entities. What is at issue is a clash not between the interests of small entities and those of large conglomerates. Rather, the issue is whether the FCC should favor one group of designated entities over another. I do not believe it should.

The Commission's Role

The Commission's intervention in the post-auction market is neither compelled nor excused by the ongoing financial obligation of the C block licensees to the U.S. Treasury. The Commission's fundamental role is that of a licensing agency, not that of a lender. Although the agency's C block rules enabled designated entities to purchase spectrum rights with installment payments, as Congress specifically contemplated (47 U.S.C. § 309(j)(4)(A)), our responsibility after the auction was to issue licenses, which were expressly

conditioned upon the licensees' fulfillment of their financial commitments.

Those who say the Commission functioned as a banker are mistaken. We never performed the banker's role (which I know well) of reviewing the bidders' balance sheets, their business plans, the wisdom of their planned bids, and the quality of their management. We never assumed the responsibility of creating "commercially reasonable alternatives" for whatever difficulties the C block licenses encountered. To the contrary, we repeatedly declared our commitment to the efficacy of the market mechanism, and our intention to enforce auction rules.[2]

Conclusion

Today's decision may enable the survival of some C block licensees who might have failed without government intervention. More likely is the prospect that the significantly sweetened selection of options will lead directly to more churn in business plans, more deviation from initial auction

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[2] I note that the Commission acted without hesitation when some successful C block bidders failed to make their down payments although they had made their deposits. The FCC immediately defaulted the bidders and assessed maximum forfeitures, applying all payments to the forfeitures. *See* "18 Defaulted PCS licenses to be Reauctioned; Reauction to Begin July 3rd," *Public Notice*, DA 96-872 (rel. May 30, 1996); *Mountain Solutions LTD, Inc.*, *Order*, 12 FCC Rcd 5904 (WTB 1997), application for review pending; *BDPCS, Inc.*, *Order*, 12 FCC Rcd 6606 (WTB 1997), application for review pending; *C.H. PCS Inc.*, *Order*, 11 FCC Rcd 22430 (WTB 1996). These bidders, and those who dropped out in the course of the auction, had no reason to expect that the Commission would subsequently change the rules of the game. It is of course impossible to sort out how these bidders would have behaved differently if they could have foreseen the accommodations that would later be offered.

results, more confusion in the financial markets, and more delay in construction of facilities. A further cost is the long-term skepticism in the market that the Commission will revise its rules whenever the pressure is great enough.

It is my view that these rule changes prolong uncertainty, and fail to treat all interested parties equitably. Accordingly, to the extent the majority goes beyond the terms of last September's order, I respectfully dissent.

SEPARATE STATEMENT OF COMMISSIONER MICHAEL POWELL, CONCURRING IN PART AND DISSENTING IN PART

Re: Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licensees (WT Docket No. 97-82)

On a fateful day in March of 1997, the Commission's Wireless Telecommunications Bureau -- at the urging of certain C-block auction winners and with all good intentions -- suspended installment payments for C-block licensees. This action set forth in motion, in my observation, a calamity of sorts that now culminates in yet another round (hopefully the last) of "March Madness." We are asked to reconsider the prior Commission's decision from last September which offered measured relief to the successful C-block auction participants, primarily out of some concern that licenses might get tied up in bankruptcy court should many of these companies default. I support that prior decision and its rationale.

As I explain more fully below, I also endorse our decision to keep the basic framework established in our prior order and to reject proposals to radically change the rules of the game. Though I support most of the modest measures we take here, I believe that more substantial modifications to help a small subset of C-block companies that find themselves unable to meet the original terms and conditions of the auction would do more harm than good. Specifically, I believe that to do so would severely compromise the prospects for both existing and future small businesses and other designated entities to raise sufficient capital to complete effectively in the

marketplace.

The C-block was established out of a recognition that small businesses and entrepreneurs, including minorities and women, faced particularly difficult challenges in raising sufficient capital to compete at auction for spectrum and for financing their eventual build-outs. The rules were designed to ensure a fair opportunity to obtain spectrum (by segregating a block and holding it out exclusively for these interests) and to provide more lenient, below-market payment terms to ease the burden of raising capital to bid for spectrum and to finance build-out. In hindsight, one might question the financing terms in light of their unintended consequences, but they were nonetheless the rules of the game established for all to abide by.

Rules, by their very nature, will always be both over-inclusive and under- inclusive. That is, they benefit some they really should not, and they will disadvantage others that should benefit. The virtue of any rule, however, is that it provides a degree of certainty and clarity. Rules should allow all players to understand the terms and conditions of the contest and to reliably predict the results of complying or failing to comply with them. In the context of an auction, relying on the established rules allows participants to evaluate the consequences of their bids -- bid too high and fail to make a payment and you will forfeit your (or your investors') money and lose your license, bid to low and you risk losing the opportunity to hold a lucrative license. In the C-block auction, all participants made these difficult decisions all along the way -- some dropped out, some stayed in. The risk assessments and decisions that each participant made were anchored in the terms and conditions of the auction as well as their vision of the future market. As long as the rules were

clearly established, the participants could make their own judgments about their risk tolerance, then knowingly face the consequences of their judgments and be held responsible in the event of market failures.

When the referee (in this case, the Commission) starts tinkering with the rules during the game, or worse after the buzzer has sounded, it does two very unfortunate things: First, it undermines the fairness of the contest. This we know from the earliest age and the principle is echoed on ball fields and gymnasium floors, in olympic arenas, during board games, and even in politics. The cardinal principle is that whether the rule is good or bad it must apply equally to all players or the game is patently arbitrary and unfair and the outcome invalid. There assuredly are always those that support the referee's intervention, because the resulting changes put them on top, or keep them in the lead. However, there are others that sit back in the locker room stunned and dismayed that the rules, advertised as conditions for victory, were changed to accommodate certain players. Second, and most importantly in my mind, is that by telegraphing to the world that the game is subject to unpredictable changes in the rules based on the subjective decisions of the tournament organizers, you discourage people from playing the game at all.

If we constantly adjust our rules to "help" certain players, no matter how sympathetic their plight, we run the very severe risk of foreclosing future opportunities for this very class of players to enter, and compete effectively, in future games. Most telecommunications contests require money to enter and more money to win. It is difficult enough for small, often unproven, companies to raise funds because of the risk associated with their ventures. The Commission should not,

by waxing and waning on the regulatory structure, make it more difficult by adding to the uncertainty. If we demonstrate that we are an unreliable referee, capital markets will be unwilling to take the additional risks associated with the regulatory uncertainty that befalls a process by which the rules can be altered at any time based on the sympathies that happen to win the day.

There are acute risks associated with the type of ventures C-block was designed to help, over which regulators have no control, but which are key risk factors for potential investors. This heightens my fear of tipping the risk scale against these companies. It should be remembered that to investors, the entities now seeking our help are inherently risky ventures to begin with. Often their management is less proven, their business plans are untested and less complete, and their optimism is sometimes overstated. This is before consideration of the stiff competition such entities will face in the marketplace if they do win a license in an auction. The additional risk we introduce by demonstrating that our rules are not truly reliable may be more than investors can bear. I sincerely question whether the events of the past and even the little bit we offer to parties in financial distress today is worth the further damage we may do to the risk calculations of investors tomorrow. The sad result being that the very class of people we hope to help now will be left short later.

This Order provides a number of measures I fully support, for they should provide each C-block licensee slightly more flexibility and, consequently, a fighting chance to attract financing, build-out and compete. Most of them clean up imperfections in the original order without doing damage to the underlying principles. In particular, with the added flexibility of the MTA- by-MTA choice of options, we have

taken away the artificial and unnecessary nationalization of the C-block "relief" plan. Instead, business plans and investment pitches can continue despite the circumstances facing these licensees. I must depart from the majority on one point, however: allowing participants to use certain down-payment "credits" and continue paying installments.

Separate Statement of Commissioner Gloria Tristani

In the Matter of Amendment of the Commission's Rules
Regarding Installment
Payment Financing for Personal Communications Services
(PCS) Licenses

Order on Reconsideration of the *Second Report and Order*

I am heartened that the Commission has agreed to a package of fair, reasonable, and commercially viable options addressing the financial issues confronted by C block licensees. And I am hopeful that the majority of licensees will find among these options the flexibility to pursue their business plans as they best see fit. I am satisfied that the Commission has done virtually all that it can to provide C block licensees flexibility and relief consistent with and required by our overriding mandate to manage the spectrum in the public interest, and so I join the majority's decision. I write separately, however, to articulate the fundamental principles guiding my decision. Those principles would have led me to support greater relief in the treatment of the down payment credit.

In granting the Commission authority to assign spectrum licenses by auction, Congress directed us to use that authority for the ends of promoting the development and rapid deployment of new technologies and services for the public, facilitating economic opportunity for designated entities and new entrants, and vigorously fostering competition. I take these directives as the lodestar of my decision.

Much has been written about the need to protect the integrity and fundamental fairness of our auctions. With this,

I fully agree. But I also believe that when the Commission acted last September, it was generally acknowledged that a significant number of C block licensees, holding licenses covering a majority of the United States, were in financial distress. The financial difficulties of several of the largest licensees cast shadows of doubt across many of the smaller licensees because of the largely interdependent nature of the licenses as building blocks for a nationwide network.

Recognizing the severity of the problem, and its responsibility to assure that this spectrum is used in the public interest, the Commission appropriately decided last year to modify its rules to provide licensees with modest, but tangible, relief. By offering relief through a public notice and comment rulemaking, we have been able to uniformly address the rights of a class of licensees without undermining the integrity of our auctions program.

Some commenters and licensees would have us go further -- to discount and restructure their debt, much as an ordinary commercial lender might. Yet the Commission is not a commercial lender, and we are confronted by competing policies as we negotiate a path as both lender and regulator. In our role as spectrum manager, it is not appropriate for the Commission to assure the success of any class of licensees. C block is an entrepreneurs' block. The truth is that entrepreneurs and small businesses do fail. And they fail at a rate greater than other businesses overall. So it would be inadvisable for the Commission to tie its spectrum management policy to the assured success of any group of licensees; to seek to avoid bankruptcies at all costs; or to become an apologist when such bankruptcies do occur. Fairness to all auctions participants requires that we not adopt measures that would significantly alter the financial

obligations that the successful bidders themselves freely assumed at auction. But we can, and should, give them the opportunity to survive and thrive.

Today's decision provides that opportunity by granting licensees significant flexibility to modify their holdings in light of market conditions and business plans. We have upheld the Commission's original decision to provide a variety of options, recognizing that no single option would be appropriate for all. The character of the relief offered is to allow licensees to surrender a certain amount of spectrum in exchange for a proportionate reduction in debt. In addition, we offer further flexibility, so that licensees may adopt different options in different regions (on a MTA basis), as well as combine prepayment and disaggregation.

Inherent in this approach is a focus on whether the licensee chooses to use or relinquish the spectrum it currently holds. Having decided to grant licensees this relief through flexibility, I believe that the use or non-use of the spectrum should remain the central point in structuring the relief options. Such a view is constructive and forward-looking, rather than focusing on whether certain licensees willfully overbid, or inadvertently overbid, or whether they overbid at all. Such past actions of any individual licensees become irrelevant, I believe, in light of our affirmation of the Commission's decision to offer comprehensive relief and flexibility to all licensees.

Centering on whether a licensee intends to use its spectrum to provide service to the public, or whether it plans to return it, my approach would lead to a different treatment of the licensee's 10% down payment on deposit with the Commission. I do not disagree that it is appropriate for some

small fee or cost to be associated with the abandonment of spectrum previously bid for, whether surrendered in a 30 MHz or 15 MHz portion. I join the majority's view that 3% of the net bid (equal to 30% of the down payment), which it adopted for most of the options, is appropriate. However, I view this cost as akin to fee for restructuring, much as a commercial bank might impose. It acknowledges the cost of the restructuring, and is in exchange for the benefits of relief from a substantial portion of debt and the creation of an automatic spectrum market (in the case of disaggregation), or the opportunity to hold an unencumbered license (in the case of prepayment). But 3% of the net bid, or 30% of the down payment, also is minimal enough not to act as a disincentive or a penalty for a licensee making a choice which the Commission has otherwise freely offered. I would not view this cost as a "deterrent to speculative bidding," which is a redressed description of a penalty for past behavior.

This cost should be associated only with the abandonment of the spectrum. The licensee would forfeit 30% of the down payment that relates to the spectrum it chooses to return, whether as a whole 30 MHz license (under the pure prepayment option) or 15 MHz piece (under either disaggregation option). Correspondingly, the licensee would retain 100% of the down payment that relates to the spectrum it chooses to keep. Critically, licensees are not penalized to the extent that they choose to go forward with providing service to the public. This approach -- focusing on the use of the spectrum -- is consistent with our spectrum management responsibilities, as expressed in Section 309(j), to promote service to the public, provide opportunity for new entrants, and foster competition.

Basing the fee on the amount of spectrum returned results in

varying credits of the down payment. Licensees would receive a 70% credit for a full license returned under the prepayment option, while receiving 85% credit for a license disaggregated, whether then prepaid or continued on installment payments. Some suggest that the lack of parallel treatment is a problem -- that each license should be subject to the same fee, whatever option is chosen. But the size or design of a license is itself arbitrary, as acknowledged by the fact that the Commission has either adopted or proposed spectrum partitioning and disaggregation rules for the majority of commercial mobile radio services. A cost per license would be a cost merely to participate in the choices we offer. That analysis is more characteristic of a bank, less a manager of the spectrum.

Likewise, today's Order suggests that we should provide greater incentives for licensees to select the prepayment option, because it has the effect of removing the Commission from the banking business. I believe this analysis has two flaws. First, any modification to the credit of the 10% down payment will affect a licensee's choice of prepayment marginally, if at all. A decision to prepay will be made on the overall economic costs and benefits to the licensee. Although prepayment may be a good option for some -- particularly those able to obtain down payment credits for the surrender of other licenses -- for others it will not, because it does not account for loss of government financing substantially below their cost of funds in the private market. Because the installment payment plan was offered at the government's cost of funds, a prepayment option discounted to the licensee's higher cost of funds would not be economically neutral to the government. For that reason, and because such a discount would fundamentally change the terms under which these bidders won (and others lost) these licenses, I

agree with the decision not to discount the debt. Nonetheless, I believe we must recognize that such a decision affects the overall economic attractiveness of prepayment. A modest tinkering with the credit of the down payment to lessen the credit for disaggregation with resumption of payments, and to increase the credit for disaggregation with prepayment, will not affect that balance.

In addition, for C block the decision for the Commission to serve as a banker is over. That decision was complete with the adoption of service rules. Whether prepayment is a good option for some, we will the remain banker for many. Though I agreed with our decision in the recent Part 1 Report and Order to temporarily suspend the use of installment payments in future rulemaking proceedings, I do not believe we should distinguish the cost of an option based upon whether it minimally reduces our banking role for this service.

Thus, I would offer an 85% credit for any licensee choosing the disaggregation option, whether prepaying or continuing on installment payments. I would not tinker with the calculation of the down payment credit, merely to make disaggregation with installment payments cosmetically equal to standard prepayment, or to make disaggregation with prepayment more attractive than disaggregation with installment payments. It is easier -- and more in the public interest -- simply to ask whether the licensee is choosing to serve the public by making use of the spectrum. Despite these decisional differences, I am pleased that the majority is able to support use of 85% of the down payment for at least one of the disaggregation options.

There is an additional area where I believe we provide

important and useful flexibility. This is the modification to allow licensees to apply to the down payment credit either to reduce principal or to apply against accumulated suspension interest. Suspension interest is, in effect, a past debt. It has accumulated because the Commission, by Bureau Order, suspended payments pending resolution of this proceeding. Allowing application of the credits to suspension interest will provide licensees modest relief from the burden of paying both past and current interest simultaneously. At the same time, we do not defer current debt. To take advantage of this option, licensees must be timely on all current interest, making a showing of financial viability.

Federal Communications Commission **FCC 98-290**

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Request for Extension of the	)	WT Docket No. 97-82
Commission's Initial Non-	)	
Delinquency Period for C and F	)	
Block Installment Payments	)	

ORDER

Adopted: October 29, 1998 Released: October 29, 1998

By the Commission: Commissioner Kennard issuing a statement. Commissioners Furchtgott-Roth and Tristani dissenting in part and issuing a joint statement.

1. On July 31, 1998, broadband PCS C and F block licensees were required to resume making installment payments on their licenses.[1] However, in accordance with the *Order on Reconsideration of the Second Report and Order* ("*Reconsideration Order*"),[2] licensees that failed to meet the

[1] "Wireless Telecommunications Bureau Announces 1998 Election Date for Broadband PCS C Block Licensees; Payments for C and F Block Licensees Resume July 31, 1998," *Public Notice*, DA 98-741 (released April 17, 1998).

[2] Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd 8345 (1998).

July 31, 1998, deadline may submit their payment on or before October 29, 1998, without being considered delinquent, if they pay a 5 percent late payment fee. Several licensees have filed requests seeking a waiver of the October 29, 1998, deadline for late payments. For the reasons stated below, we deny these requests.

2. Airadigm Communications, Inc. ("Airadigm") asks the Commission to suspend its installment payment for 12 months.[3] Airadigm claims that, without a waiver of the Commission's rules, its inability to fulfill both its obligation to the Commission and its obligation to its principal creditor will threaten the provision of service to its customers and the expansion of its system.[4] Urban Comm-North Carolina, Inc. ("Urban Comm") argues that, due to the collapse of financial markets after the issuance of the *Reconsideration Order*, the Commission should extend the non-delinquency period another 180 days.[5] In addition, 21st Century Telesis Joint Venture and its wholly-owned subsidiary, 21st Century Bidding Corp. (collectively, "21st Century") seek an extension until January 31, 1999, for the resumption of their

[3] Airadigm Request for Rule Waiver at 3 (seeking a partial waiver of 47 C.F.R. § 24.711(b) and a waiver of § 1.2110(f)(4)). In light of our denial of Airadigm's request, and as requested by Airadigm, we will return Airadigm's supplemental pleading containing privileged and confidential information.

[4] *Id.* at 2.

[5] Urban-Comm Petition for Extension of Interest Payment Date at 2 (although Urban-Comm appears to be seeking an extension on behalf of all C block licensees, we will treat Urban-Comm's petition as an individual waiver request because the time period for making global requests has expired).

installment and accrued interest payment obligations.[6] 21st Century asserts that it needs more time to finalize negotiations for capital placement in light of recently discovered problems with its original capitalization plan.[7] SouthEast Telephone, Inc. ("SouthEast Telephone") requests relief through December 31, 1998, in order to allow it time to receive anticipated funding.[8] Funding delays also caused Wireless Ventures, Inc. to seek an extension until December 13, 1998, or whatever time period the Commission provides to other C block licensees that also are seeking waivers.[9] Finally, Personal Communications Network, Inc. ("PCN") asks for a two-week grace period to accommodate last-minute delays with a needed stock subscription.[10]

3. We decline to waive the October 29, 1998, late payment deadline in response to the individual situations presented. In order for a waiver of the PCS rules to be granted, one of two tests must be met. The entity requesting a waiver must demonstrate either that: (1) "the underlying purpose of the rule will not be served, or would be frustrated, by its application in a particular case, and that grant of the waiver is otherwise in the public interest" or (2) "the unique facts and

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[6] 21st Century Emergency Petition at 3 (seeking a waiver of 47 C.F.R. § 1.2110(f)(4)(iii)). We note that 21st Century's request is rendered moot because it submitted its payment on October 28, 1998.

[7] *Id.* at 4.

[8] SouthEast Telephone Emergency Request at 1, 6 (seeking a waiver of 47 C.F.R. § 1.2110(f)(4)(iii)).

[9] Wireless Ventures, Inc. Emergency Request for Waiver at 2 (seeking a waiver of the automatic cancellation provisions of 47 C.F.R. § 1.2110(f)).

[10] PCN Request for Grace Period and Waiver of Rule 1.2110(f)(4)(iii) & (iv) at 1.

circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest."[11]

4. Although the specific concerns raised by each petitioner vary, all revolve around the same theme -- the inability to raise capital. The challenge of raising capital to finance C and F block licenses exists in varying degrees for all licensees and does not constitute "unique facts and circumstances." In formulating, as well as reconsidering, the restructuring options, the Commission addressed the challenges of raising capital. Further, we do not believe that the underlying purpose of our rules would be frustrated by their application here or that it would serve the public interest to delay their enforcement. As we stated in the *Reconsideration Order*, "[n]o matter what deadline we establish, it is inevitable that some licensees will seek more time to pay."[12]

5. Although we are sympathetic to the difficulties certain licensees are facing in securing capital, the Commission made it clear that it "will not entertain any requests for an extension" beyond the 60-day non-delinquency period that originally was established for initial payments not submitted by the payment resumption date for C and F block licensees.[13]

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[11] *See* 47 C.F.R. § 24.819.

[12] *Reconsideration Order*, 13 FCC Rcd at 8354 para. 24.

[13] Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Second Report and Order and Further Notice of Proposed Rule Making*, 12 FCC Rcd 16,436, 16,451 para. 30 (1997). *See also* Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, WT Docket No. 97-82, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 441

Further, we ratified a firm deadline for late payments in the *Reconsideration Order*.[14] Despite the fact that our rules, as amended effective March 16, 1996, allow an automatic grace period for installment payments not made within a non-delinquency period,[15] we determined that such a grace period is not appropriate for the initial July 31 payment.[16] First, licensees have already enjoyed a payment suspension since the spring of 1997.[17] Second, in the *Reconsideration Order*, we provided additional relief by extending to 90 days the original 60-day non-delinquency period for initial payments. A further extension of the non-delinquency period would only serve to undermine the Commission's enforcement of its payment deadlines. Therefore, licensees that failed to make payment by July 31, 1998, and fail to make full payment by October 29, 1998, including the 5 percent late payment fee, will be subject to the automatic cancellation of their licenses.[18]

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para. 112 (1997) (reiterating that extension requests will not be entertained).

[14] *Reconsideration Order*, 13 FCC Rcd at 8355 para. 26.

[15] *See* 47 C.F.R. § 1.2110(f)(4)(ii).

[16] *Reconsideration Order*, 13 FCC Rcd at 8355 para. 26.

[17] Installment payments were suspended for C block licensees on March 31, 1997, and for F block licensees on April 28, 1997. *See* Installment Payments for PCS Licenses, *Order*, 12 FCC Rcd 17,325 (WTB 1997); "FCC Announces Grant of Broadband Personal Communications Services D, E, and F Block BTA Licenses," *Public Notice*, DA 97-883 (released April 28, 1997) at 2.

[18] *See* "Wireless Telecommunications Bureau Provides Guidance on Grace Period and Installment Payment Rules," *Public Notice*, DA 98-1897 (released September 18, 1998). We note that on October 28, 1998, the D.C. Circuit denied an emergency motion filed by SouthEast Telephone seeking a stay of the license cancellation deadline. *SouthEast Telephone, Inc. v. FCC*, No. 98-1491 (Order of October 28, 1998).

6. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 309(j), the requests filed by Airadigm Communications, Inc., Urban Comm-North Carolina, Inc., SouthEast Telephone, Inc., Wireless Ventures, Inc., and Personal Communications Network, Inc. for a waiver of the October 29, 1998, late payment deadline for C and F block licensees are DENIED and the waiver request filed by 21st Century Telesis Joint Venture and 21st Century Bidding Corp. is DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

SEPARATE STATEMENT OF CHAIRMAN WILLIAM KENNARD ON C BLOCK RESUMPTION OF PAYMENT WAIVER DENIALS

I am sympathetic to the communities being served by the six PCS providers that have requested a waiver of the October 29 deadline for late payment for C block licenses. I am especially moved by the desire of some of these providers to serve previously underserved communities, including areas inside Native American reservations. However, the Commission has done the right thing by denying these requests. We have stated unequivocally that we would not entertain any extensions of this payment deadline. When these companies won licenses in the Commission's C block auction they knew they would eventually have to pay what they bid. These companies have not had to make any payments for their licenses since March of 1997 -- over a year and a half ago. The time to fulfill the commitments they made to the U.S. Treasury is now.

The bottom line is we need to have an even playing field. There are many small businesses that made their payments on the original payment date of July 31, and we anticipate many more making their payments today. It is simply not fair to give these six companies special treatment.

We have said from the beginning of the auction program that the Commission's job is to create opportunities, not to guarantee successes. We have done our job. Now it is up to these companies to develop successful businesses.

Statement of Commissioners Harold Furchtgott-Roth and Gloria Tristani, Dissenting in Part

In the Matter of Requests for Extension of the Commission's Initial Non-Delinquency Period for C and F Block Installment Payments

By its actions today, the Commission majority disregards licensees who are fulfilling the Commission's Section 309(j)[1] mandate that the spectrum be used to deliver service to the public, including those residing in underserved rural areas.

This Order issues a blanket denial of six requests for waiver of the October 29, 1998, late payment date for C and F Block licensees. The majority finds that the concerns raised by each petitioner "all revolve around the same theme -- the inability to raise capital." It then concludes: "The challenge of raising capital to finance C and F block licenses exists in varying degrees for all licensees and does not constitute 'unique facts and circumstances.'" On this depth of analysis, the majority denies all of the requests. We respectfully dissent in part from this decision because we believe that two of the requests satisfy the Commission's standard for granting a waiver.

Our rules provide that the Commission may grant waiver requests if "the underlying purpose of the rule will not be served, or would be frustrated, by its application in the particular case, and that grant of the waiver is otherwise in the public interest," or if "the unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome, or otherwise contrary to the public

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[1] 47 U.S.C. § 309(j).

interest."[2] As this standard refers to a rule's "application in a particular case," as well as to the "unique facts and circumstances of a particular case," we believe that these requests warrant a hard look and due consideration of the specific facts presented in the pleadings.

The majority is correct that, in establishing the payment resumption date in the C Block *Reconsideration Order*,[3] we departed from our standard payment rules governing all services. That date was subsequently set for July 31, 1998, with a one time non-delinquency period of 90 days (with a 5% late fee). Hence, in order to avoid default and automatic license cancellation, those payments are due today, October 29, 1998. In contrast, our standard payment rules provide for a 90-day non-delinquency period, followed by a 90-day grace period, each with corresponding late fee.[4] In the *C Block Reconsideration Order*, we declined to apply those provisions for the initial resumption of payments on the premise that the licensees already had received a year of suspension of payments. However, the decision not to apply a 90-day grace period across the board for all C block licensees does not -- and should not -- mean that we summarily reject a request for a limited extension of the payment obligation upon an individualized showing that such action would be in the public interest.

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[2] 47 C.F.R. § 24.819 (1997).

[3] Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd 8345 (1998) ("*C Block Reconsideration Order*").

[4] 47 C.F.R. § 1.2110(f)(4)(i),(ii).

In this regard, we find the majority's disposition of two of today's waiver requests to be particularly disconcerting. Airadigm Communications, Inc., holds 13 C Block licenses in largely rural Wisconsin and was the first non- pioneer's preference licensee to begin offering service. It has invested over $100 million in its markets, has built-out its facilities to cover one million people (over 1/3 of its licensed population), and currently has over 7,000 subscribers. Many of these subscribers live on the Oneida Indian Reservation, an area which never before had received wireless coverage. Airadigm also provides service for the tribe's public safety operations, so that the tribe's police force, for the first time, has mobile telecommunications. Airadigm consistently has complied with our rules, successfully making both first and second downpayments, as well as being one of the few C Block licensees submitting a first installment payment after the Commission suspended payments on March 31, 1997. These past payments to the Commission total more than $8 million. Airadigm now requests a six-month deferral of its $2.3 million second installment payment, pending a cash infusion from a sale and lease-back of it's towers, as well as a second round of private financing.

SouthEast Telephone, Inc., holds 6 C Block licenses in rural Kentucky. SouthEast initiated service on October 1. It plans to offer both mobile and local loop service to an area with telephone penetration of only 80-90%, well below the national average. SouthEast's present construction covers 15% of their licensed population, and it is constructing sites to double its total within the next month. After substantial delay on a pro forma transfer which was approved by the Commission in January of this year, SouthEast successfully obtained financing which has allowed it to contract for its remaining buildout. SouthEast also successfully made its

first and second down payments. It now seeks a two-month deferral of approximately $400,000, pending a cash infusion from private investors based on service milestones, as well as a sale and lease-back of its towers, both of which are expected to occur in the next 60 days.

We believe that the facts of these particular cases meet at least the second prong of the waiver standard, and that strict application of the payment deadline and the default and automatic cancellation rules here would be "inequitable, unduly burdensome, or otherwise contrary to the public interest." Section 309(j) mandates that we protect the public interest in the use of the spectrum and promote several goals. Among them are two critical goals implicated here: (1) "the development and rapid deployment of new technologies, products and services for the benefit of the public, including those residing in rural areas," and (2) "recovery for the public of a portion of value of the public spectrum resource."[5] We believe that these goals require balancing, that neither is to take absolute precedence over the other, and that granting a temporary waiver in these cases ultimately would best serve both objectives.

Here we have two licensees providing valuable service to previously unserved, or underserved, areas. Both are experiencing temporary financial difficulty, and have asked for a brief window of time to remedy their shortfall. Both have essentially demonstrated their broader viability and their commitment to providing service to the public. Both have a prior history of successful compliance with our payment deadlines. Both have provided significant detail regarding

[5] 47 U.S.C. § 309(j)(3)(A),(C).

their current finances, their private creditor arrangements, and their sources of expected capital which would allow them meet their obligation after a short deferral. And both have requested extensions for limited periods of time (2 months and 6 months), tailored to their expected infusions of capital.

In the past, the Commission has recognized the occasional need for flexibility in our installment payment program. Indeed, that is why our standard rules provide for automatic non-delinquency and grace periods totalling 180 days. We have consistently distinguished between the upfront and down payments, on the one hand, and installment payments, on the other. Timely down payments, we have found, are a critical indicator of a licensee's financial health and ability to construct its system and, ultimately, to provide service to the public. Thus, we have granted waivers of the down payment rules only in extremely limited circumstances. But with installment payments, we have recognized the fluctuations inherent in business cycles and the occasional need for flexibility. The fact that these extensions are provided automatically, by rule, rather than by individual showing of exigent circumstances, only underscores this point. Where a licensee has demonstrated its viability through its down payments and has substantially built-out its system, some limited form of flexibility upon a showing of unique facts and circumstances is all the more warranted.

It may be said that these licensees simply have chosen to pay other creditors before the FCC, and that we should not countenance such a result. As the Commission has noted in previous decisions on the C and F Block installment payment program, we find ourselves in the difficult position of being both regulator and lender to our licensees. If, in our latter role, we had the freedom to behave as commercial lenders,

we could use many tools to restructure the loans of debtors in financial straits. We could raise interest rates or secure additional collateral, for example. The Commission has very little latitude, however, to work with its debtors. Indeed, the only flexibility we have is to grant extensions of payment deadlines. We must not let a fear of "opening the floodgates" deter us from applying judgment to individual cases. Nor must we become so unyielding in our financial role that we undermine our paramount charge of ensuring that the spectrum is used in the public interest.

Finally, these licensees may actually survive -- that is, make their installment payment and keep their licenses by risking their future financing and future stability -- without an extension of the payment deadline. We would be willing to take this "risk" of misjudging the licensees' ability to pay because we believe there is far greater risk for the Commission to deny the extension and watch a successful C Block licensee lose its license and a community of Americans once again become unserved.

Federal Communications Commission **FCC 99-62**

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Request for Extension of the	)	WT Docket No. 97-82
Commission's Initial Non-	)	
Delinquency Period for C and F	)	
Block Installment Payments	)	

Adopted: March 25, 1999 Released: April 2, 1999

By the Commission: Commissioners Furchtgott-Roth and Tristani dissenting and issuing a joint statement.

1. We have before us petitions for reconsideration ("Petitions") filed by SouthEast Telephone, Inc. ("SouthEast") and Wireless Ventures, Inc. ("Wireless Ventures") (collectively "Petitioners"). They seek review of the Commission's order, released October 29, 1998, denying requests for waiver of the October 29, 1998, deadline for late resumption of installment payments filed by several broadband PCS C and F block licensees, including Petitioners.[1] Additionally, SouthEast filed an Emergency

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[1] See In the Matter of Requests for Extension of the Commission's Initial Non-Delinquency Period for C and F Block Installment Payments, WT Docket No. 97-82, *Order*, FCC 98-290 (released October 29, 1998) ("*October 29th Order*"). On November 30, 1998, Wireless Ventures submitted a filing styled an application for review of a Bureau order, rather than a petition for reconsideration of the Commission's *October 29th Order*, as procedure mandates. For the purpose of this order, we will treat Wireless

Request for Stay ("Emergency Request") of the *October 29th Order*[2] and a Request for Stay of the auction of the licenses formerly held by SouthEast.[3] On November 20, 1998, by Public Notice, we requested comment on SouthEast's Petition.[4] We received two comments in support of the Petition.[5] For the reasons stated below, we deny the Petitions and SouthEast's Emergency Request.

2. *Petitions.* SouthEast contends that the Commission did not address the specific facts and circumstances that supported SouthEast's request for waiver under the "hard look" standard set forth in *WAIT Radio v. FCC*.[6] Commenters AirNet and DiGiPH support this argument.[7] Wireless Ventures argues that the Commission erred in holding that

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Ventures' Application for Review as a petition for reconsideration.

[2] SouthEast filed both its Petition and Emergency Request on November 4, 1998. SouthEast also submitted a Supplement to Petition for Reconsideration on November 30, 1998, a Second Supplement to Petition for Reconsideration on December 4, 1998 ("Second Supplement"), and a Third Supplement to Petition for Reconsideration on February 25, 1999 ("Third Supplement"). Pursuant to Section 1.106(f) of the Commission's rules, SouthEast's Second Supplement and Third Supplement are untimely. Nevertheless, we will address the issues they raise.

[3] SouthEast filed a Request for Stay Or, In the Alternative, For Withdrawal of Markets From Relicensing Process on March 11, 1999 ("Request for Stay").

[4] "Wireless Telecommunications Bureau Seeks Comment of Petition for Reconsideration," Public Notice, DA 98-2343 (released November 20, 1998).

[5] See Comments of AirNet Communications Corporation ("AirNet"), filed November 30, 1998, and Comments of DiGiPh PCS, Inc. ("DiGiPh"), filed November 30, 1998.

[6] 418 F.2d 1153 (D.C. Cir. 1969) ("*WAIT*").

[7] Comments of DiGiPH at 2; Comments of AirNet at 2.

the public interest would not be harmed by denying its request for waiver.[8]

3. We disagree with Petitioners' contentions. At the outset, we note that the court in WAIT stated that because the "very essence of waiver is the assumed validity of the general rule; . . . an applicant for waiver faces a high hurdle even at the starting gate."[9] The Commission has repeatedly given a hard look to the facts supporting these requests for waiver. Indeed, before issuing the *October 29th Order*, the Commission looked carefully at the facts of each individual waiver request, including SouthEast's,[10] as well as additional facts submitted by SouthEast.[11] SouthEast has not provided any new facts to convince us that our previous decision was wrong.

4. The Commission's decision in the *October 29th Order* was clearly contemplated by the *C Block Second Report and Order, the C Block Order on Reconsideration of the Second Report and Order* and the *Election and Payment Date Order*, in which the Commission carefully considered all aspects of the installment payment issues raised by Petitioners and provided restructuring options and a lengthy suspension of

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[8] See Wireless Ventures' Petition for Reconsideration at 3.

[9] 418 F.2d at 1157. See *BellSouth Corporation and BellSouth Wireless, Inc. v. FCC*, No. 97-1630 (D.C. Cir. January 8, 1999) (upholding Commission denial of a waiver request).

[10] See Emergency Request for Temporary Waiver or Suspension of the Automatic Cancellation Provision of Section 1.2110(f)(4)(iii) of the Commission's Rules, dated October 26, 1998.

[11] See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, from Jay N. Lazrus, Myers Keller Communications Law Group, dated October 28, 1998.

installment payments.[12] In the *C Block Second Report and Order*, the Commission informed the public that it was unlikely to grant waivers of the payment resumption deadlines in light of public interest considerations, particularly as the Commission had already afforded licensees a significant period to raise capital during the time that installment payments were suspended.[13] We observed in the *October 29th Order* that "[i]n formulating, as well as reconsidering, the restructuring options, the Commission addressed the challenges of raising capital."[14] Acknowledging that access to capital remains an important issue for most C block licensees, including Petitioners, the Commission nonetheless concluded that "a further extension of the non-delinquency period would only serve to undermine the Commission's enforcement of its payment deadlines."[15] Petitioners' requests for waiver were denied not because the Commission failed to give them the hard look they warranted, but rather because the Commission does not agree with

[12] See Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Second Report and Order*, FCC 97-342, 12 FCC Rcd 16436 (1997) ("*C Block Second Report and Order*"); Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Order*, FCC 98-28 (released February 24, 1998) at ¶ 2 ("*Election and Payment Date Order*"); Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd 8345 (1998) ("*C Block Order on Reconsideration of the Second Report and Order*").

[13] 12 FCC Rcd at 16541.

[14] *October 29th Order* at ¶ 4.

[15] *October 29th Order* at ¶ 5.

Petitioners that further extension of the payment deadline would serve the public interest.

5. Furthermore, we disagree with SouthEast's argument that the Commission's payment rules are unclear and do not necessarily result in the automatic cancellation of licenses for a late installment payment.[16] At the time that SouthEast purchased its licenses, the payment rules provided that a license would cancel following the expiration of any grace period without the successful resumption of payment or upon default with no grace period.[17] The *C Block Order on Reconsideration of the Second Report and Order* amended the rules to provide that a payment made "more than ninety (90) days" after the resumption payment due date would be deemed a default on the part of the C or F block licensee.[18] In a Public Notice, released April 17, 1998, the Wireless Telecommunications Bureau ("Bureau") stated that licensees that failed to meet the July 31, 1998, payment resumption deadline could submit their payment on or before October 29, 1998, without being considered delinquent, if they timely pay a five percent late payment fee.[19] Most recently, the Bureau reiterated this policy in a Public Notice, dated September 18, 1998, in which it stated that licensees that miss the late payment deadline shall be in default and their licenses shall

[16] SouthEast Petition at p 13.

[17] 47 C.F.R. § 1.2110(e)(4)(iii) (1996).

[18] *C Block Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd at 8354.

[19] See "Wireless Telecommunications Bureau Announces June 8, 1998 Election Date for Broadband PCS C Block Licensees," *Public Notice*, DA 98-741 (released April 17, 1998). See also 47 C.F.R. § 1.2110(f)(4)(iii).

automatically cancel.[20] Contrary to its contentions, SouthEast was well aware that its licenses would cancel automatically if it failed to make full payment of amounts due on October 29, 1998, and cannot claim that the rules do not operate as a matter of law to effectuate automatic cancellation.

6. In denying Petitioners' requests, we reject SouthEast's argument that grant of its waiver request would be consistent with the TE-MCG decision,[21] in which the Bureau granted Specialized Mobile Radio (SMR) licensee TE- MCG's request for waiver of 47 C.F.R. § 90.812, which governs installment payments for 900 MHz SMR licensees.[22] In that case, as a result of an administrative oversight, the Bureau accepted late payment of several installments and timely payment of subsequent installments from TE-MCG, constructively waiving the deadlines for the late regularly scheduled payments. In contrast, after clearly stating its intention not to extend the October 29, 1998 late payment deadline, the Commission expressly refused to grant Petitioners' waiver requests. Thus, unlike the TE-MCG case, the Commission has committed no act that could reasonably be construed as constructively waiving the applicable October 29, 1998, late payment deadline, obviating the need to grant a waiver in this instance. Therefore, we declined to grant SouthEast's waiver on the merits of its case, and the TE-MCG decision is inapposite.

7. Lastly, SouthEast contends that application of the

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[20] See Public Notice, DA 98-1897 (released September 18, 1998).

[21] See Third Supplement.

[22] See Letter to Lloyd W. Coward, Esq., from Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, DA 99-258 (released January 29, 1999).

Commission's rules on late installment payments and resumption payments[23] to SouthEast is retroactive rule making prohibited by the Administrative Procedure Act.[24] More specifically, SouthEast claims that the Commission's elimination of the provisions for grace period requests under former Section 1.2110(e)[25] impaired SouthEast's rights with respect to its previously established installment payment obligations. AirNet supports this contention.[26] In effect, SouthEast is requesting reconsideration of the *Part 1 Third Report and Order*, which was the Order in which the Commission eliminated the grace period provisions. This request is untimely[27]. Nevertheless, timely filed petitions for reconsideration of the *Part 1 Third Report and Order* raising this issue are pending before the Commission.[28]

8. *Requests for Stay.* SouthEast bases its Emergency Request and its Request for Stay on the four prong test for issuance of a stay set forth in *Virginia Petroleum Jobbers Ass'n v. FPC*,[29] as modified in *Washington Metropolitan*

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[23] 47 C.F.R. §§ 1.2110(f)(4)(iii) and 1.2110(f)(4)(iv) (1998).

[24] SouthEast Petition at pp 14-21; see 5 U.S.C. §§ 551 *et seq.*

[25] 47 C.F.R. § 1.2110(e)(4) (1997). See Amendment of Part 1 of the Commission's Rules -- Competitive Bidding, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, 4660-4685 MHz, WT Docket 97-82, ET Docket No. 94-32, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 436-42, ¶¶ 106-113 ("*Part 1 Third Report and Order*").

[26] Comments of AirNet at 3.

[27] See 47 C.F.R. § 1.429(d).

[28] See 63 Fed. Reg. 9793 (1998).

[29] 259 F.2d 921 (D.C. Cir. 1958) ("*Virginia Petroleum*").

Area Transit Comm'n v. Holiday Tours, Inc.[30] Under this test, a stay is warranted if the movant can demonstrate that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm absent a stay; (3) interested parties will not be harmed if the stay is granted; and (4) the public interest would favor a grant of the stay. Upon examination of the Emergency Request and the Request for Stay, we find that SouthEast's arguments fail to meet the standards set forth in *Virginia Petroleum* and *Washington Metropolitan*.[31] SouthEast bases its contention that it meets the standards for issuance of a stay on the expectation that the Commission will grant its Petition. As discussed above, this is not the case. Therefore, SouthEast does not meet the test.

9. Accordingly, IT IS ORDERED that, pursuant to the authority granted in Section 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 309(j), the petitions for reconsideration submitted by SouthEast and Wireless Ventures ARE

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[30] 559 F.2d 841 (D.C. Cir. 1977) ("*Washington Metropolitan*").

[31] On October 28, 1998, SouthEast filed an Emergency Petition for Stay of the payment resumption deadline in the U.S. Court of Appeals for the D.C. Circuit. The court denied the request on October 28, 1998. *See SouthEast Telephone, Inc. v. FCC*, No. 98-1491 (D.C. Cir. October 28, 1998). On October 29, 1998, SouthEast filed an ex parte request for a temporary restraining order ("TRO") in the U.S. District Court for the Eastern District of Kentucky, which the court granted, but rescinded on November 5, 1998. *See SouthEast Telephone, Inc. v. FCC*, No 98-465, Order dissolving TRO (E.D. Ky. Nov. 5, 1998). Subsequently, SouthEast filed an Emergency Petition to Stay Under the all Writs Act of the payment resumption deadline in the U.S. Court of Appeals for the D.C. Circuit, which the court denied on December 4, 1998. *See SouthEast Telephone, Inc. v. FCC*, No. 98-1555 (D.C. Cir. December 4, 1998). We note that SouthEast filed as its Second Supplement, copies of submissions made in connection with this last case in the D.C. Circuit.

DENIED as provided herein.

10. IT IS FURTHER ORDERED that SouthEast's Emergency Request IS DENIED.

11. IT IS FURTHER ORDERED that SouthEast's Request for Stay IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

Dissenting Statement of Commissioners Harold Furchtgott-Roth and Gloria Tristani

In the Matter of Request for Extension of the Commission's Initial Non-Delinquency Period for C and F Block Payments

In today's action, the Commission fails to reconsider adequately an earlier decision which has the effect of cutting off communications service to underserved areas of rural Kentucky. For the reasons set forth below, we respectfully dissent from this decision.

In a 3-2 decision October 29, 1998, the Commission denied the request of C- Block licensee SouthEast Telephone, Inc., ("SouthEast") to grant a limited waiver of the deadline for resumption of installment payments. We dissented from the October 29th decision because we believed that the SouthEast situation met the criteria for waiver and that, at the very least, SouthEast's request warranted "a hard look and due consideration of the specific facts presented in the pleadings."

In its decision denying SouthEast's Petition for Reconsideration, the majority argues that denial of the waiver request was "clearly contemplated" by the original C-Block order. Although the Commission indicated that it would be reluctant to grant requests for extension, we cannot support the notion that a rule could fully anticipate and obviate all subsequent waiver requests. To do so would render the waiver process meaningless.

Moreover, the majority claims, but does not support the conclusion, that the Commission "looked carefully at the facts" of SouthEast's waiver request, as well as additional facts submitted by SouthEast before the October 29th

decision. We expressly disagreed with this assertion in our statement on the October 29th decision, and we continue to dispute the majority's claim that the Commission has given SouthEast the "hard look" required for waiver requests. The lack of analysis -- and even recitation -- of the facts of the case in both decisions belies the majority's assertion.[1] By merely repeating but not supporting its claims in the present decision, the majority disregards the purpose of the reconsideration process.

Finally, the majority states that "SouthEast has not provided any new facts to convince us that our previous decision is wrong." New facts, however, need not be provided by a petitioner, nor found by the Commission, as a prerequisite for the FCC to modify or reverse an earlier decision. Petitions need only "state with particularity the respects in which petitioner believes the action taken by the Commission or the designated authority should be changed [and] where appropriate, cite the findings of fact and/or conclusions of law which petitioner believes to be erroneous . . . ." 47 C.F.R. Sect. 1.106(d). Thus, even if we were to agree with the majority's analysis of the new facts presented by SouthEast, we believe the majority has failed to reconsider adequately its October 29th decision.

It is unfortunate that the Commission's zeal to enforce a self-created deadline has hampered its ability to fairly address petitions for waiver and reconsideration and has frustrated its

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[1] For a discussion of these facts, see our previous statement. Dissenting Statement of Commissioners Harold Furchtgott-Roth and Gloria Tristani, In the Matter of Requests for Extension of the Commission's Initial Non-Delinquency Period for C and F Block Installment Payments, WT Docket No. 97-82, *Order*, FCC98-290 (released October 29, 1998).

mandate from Congress to provide communications service to the public, including those in underserved rural areas. As for this particular situation, however, it is distressing that this same zeal will cut off communications service to underserved areas of rural Kentucky.

WILKIE FARR & GALLAGHER

March 13, 1997

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Chief
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RE: Request For Modification Of Entrepreneurs' Block Installment Payment Obligations From A Quarterly To An Annual Payment Schedule

Dear Ms. Farquhar:

The undersigned Broadband C Block Personal Communications Service ("PSC") licensees ("Petitioners"),[1] by their counsel, hereby request a reformation of their Installment Payment Plan Notes and Security Agreements to modify existing installment payment obligations by moving from a quarterly to an annual payment schedule.[2] The public interest

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[1] Petitioners include: Alpine PCS, Inc.; DCR PCS, Inc.; Eldorado Communications, L.L.C.; Indus., Inc.; KMTel L.L.C.; Mercury PCS, L.L.C.; Miccom Associates; NextWave Communications, Inc.; and R&S PCS, Inc.

[2] The requirement that C Block PCS licensees tender installment payments on a quarterly basis is not in the Commission's rules. Rather, it is created by the Note and Security Agreement signed by the Commission and each licensee. For this reason, no waiver of the Commission's rules is necessary to implement the instant request for C Block PCS licensees. Rather, pursuant to the Installment Payment Plan Note and the Security Agreement for C Block licensees, the Commission may reform the terms of the documents and licensees may consent by re-executing the documents.

benefits of the requested reformation by March 31, 1997, the date upon which interest payments fall due for numerous C block licensees, are detailed below.

Over the past several years, the Commission has pursued an aggressive spectrum assignment agenda – conducting 12 auctions to assign 3,651 FCC licenses, including over 2,000 new broadband PCS licenses. Consistent with its Section 309(j) obligations,[3] the Commission reserved a number of these licenses for small businesses and entrepreneurs.[4]

Since the Commission initially formulated competitive bidding rules for small businesses and entrepreneurs, the financial and regulatory climates in which such licensees operate have changed fundamentally. Some changes are positive, such as the Commission's willingness to revise its rules in order to remove unnecessary impediments to rapid facilities-based competition. Some changes are the direct result of the increasingly competitive marketplace. That is, all new entrants must construct their licenses quickly in order to

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However, for the reasons stated herein, Petitioners believe that any reformed terms should be automatically incorporated into all other C and F block installment payment instruments.

[3] 47 U.S.C. §§ 309(j)(3)(B) and (4)(D).

[4] Small businesses have won nearly 50% of the licenses awarded through competitive bidding by the Commission. *See Statement of Reed E. Hundt, Chairman, Federal Communications Commission, on Spectrum Management Policy*, before the Subs. on Telecommunications, Trade, and Consumer Protection, Comm. on Commerce, U.S. House of Representatives (Feb. 12, 1997).

maintain their competitiveness.[5] This market-driven buildout acceleration greatly benefits consumers but places a strain on new entrants, whose challenge is further complicated by an increasingly cautions domestic investment climate.[6] In all, small businesses and entrepreneurs experience acutely the effects of these changed circumstances. For this reason, reformation of the debt instruments is entirely appropriate.

With the influx of new wireless competitors and the recent launch of new PCS network, financial investors are fully occupied *assessing* the financial effects o these new wireless services in a rapidly changing telecommunications environment. Given the inherent volatility and seasonal nature of the capital markets, modification of the installment plan to provide for annual payments will provide small businesses with greater flexibility to time their fund raising activities around favorable market conditions or when competition for funding is less congested. It also will give small businesses additional flexibility to take advantage of the benefits that are expected to arise out of the recent WTO Agreement.

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[5] The Commission has reported wireless infrastructure investment in 1996 alone to be in excess of $26 billion. *See, e.g.*, Keynote Address of Michele C, Farquhar before the Telecommunications Reports, "Next Generation Wireless" Conference (Feb. 13, 1997)(Ms. Farquhar reporting that wireless investment, employment and subscribers *all* have increased by over 100% in 1996).

[6] The financial market have been inundated with competing requests for funding for telecommunications ventures. By the end of 1996, a record number of new telecommunications equity offerings had emerged. Concomitantly, investors increasingly scrutinize wireless carriers' ability to successfully adjust to the new era of wireless competition. *See, e.g.*, "A Meeting With Reed Hundt," *Bensche-marks*, vol. 97-04 (Feb. 24, 1997) (reporting that "the money pool for the C-Block was extremely tight").

The public interest benefits of reforming the installment payment plan instruments are significant. Most important, such changes will help ensure competition from new entrant small business and entrepreneur carriers. As the Commission intended when structuring installment payments, new wireless entrants are emerging from the entrepreneurs' blocks and are posied to provide an innovative range of price and service competition. Modifying the installment payment plan will fuel these efforts and further expand job creation in the wireless sector by permitting carriers to immediately concentrate their capital resources toward infrastructure buildout.

A greater immediate capital allocation toward auction payments necessarily diminishes the resources available for infrastructure development and job creation. The deferral and revision of entrepreneurs' block installment payment obligations, as proposed herein, would serve the public interest by permitting entrepreneurs' block licensees to focus on the establishment of the telecommunications infrastructure necessary to provide competitive wireless service. This would facilitate a quicker time-to-market for small business licensees, which would in turn allow them to start generating revenues from their deployed infrastructures at aa earlier time. In addition, it would help mitigate the time-to-market infrastructure deployment advantage that cellular incumbents and A and B Block licensees have enjoyed as an unintended result of the Commission's PCS auction schedule.

Moving from a quarterly to an annual payment schedule is a modest reformation of the Payment Plan Notes and Security Agreements. It conforms to the simple annual interest calculation on which existing payments are based, and it keeps the government whole in terms of the amount of funds collected from each licensee. Granting the request would not

reduce the amount of funds any licensee would pay. Under this proposal, the total mount of interest paid into the U.S. Treasury annually would remain unchanged from the amounts currently specified in the Commission's installment plan amortization schedules. The proposal merely defers for one year the date on which each licensee's next scheduled installment payment is due, with subsequent installments to be paid thereafter on an annual basis.

Reformation of the installment payment plan debt instruments is entirely consistent with Congress' directives and the Commission's actions governing small businesses. Both Congress and the Commission recognize the utility of federal efforts to enable small businesses to enter new markets and provide new services. In addition to Section 309(j), Congress recently passed federal legislation designed to address the needs of small businesses.[7] Among other things, the Small Business Fairness Act requires federal regulatory agencies to monitor and respond to the needs of small businesses. Similarly, Section 257 of the Communications Act[8] requires the Commission to identify and eliminate market entry barriers for small businesses. The Petitioners' proposal is entirely consistent with this legislation because it addresses directly the chief barrier recognized by the Commission: access to the capital markets.

The Commission, too, has begun to implement its statutory obligation to reduce market entry barriers for small businesses

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[7] *See, e.g.*, Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Star. 847 (1996), *codified at* 5 U.S.C. § 601 *et seq.*; *see also* 47 U.S.C. § 257.

[8] 47 U.S.C. § 257.

through its *Notice of Inquiry*.[9] The Commission also recently recognized the promotional impact of installment payment programs for entrepreneurs and small businesses.[10] In recognition of the critical nature of installment payment schedules to the ultimate competitiveness of small businesses and entrepreneurs, the Commission sought comment on the appropriate schedule of installment payment terms for general application.[11] The Commission's experience with installment payment programs likely influences its contemplation of wholesale revision of its installment payment rules. However, the prospective nature of the Commission's proposed action renders the existing installment payment programs suboptional for existing licensees. This, in turn, counsels toward reformation of existing debt instrument arrangements for current licensees.

For these reasons, the Petitioners request expedited action in reforming their Installment Payment Plan Notes and Security Agreements with the Commission to modify existing installment payment obligations by moving from a quarterly to an annual payment schedule. We respectfully request that this action be taken before March 31, 1997, the date on which many

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[9] *See, Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses*, GN Docket No. 96-113, *Notice of Inquiry*, FCC Rcd 6280 (1996).

[10] Amendment of Part I of the Commission's Rules – Competitive Bidding Proceeding, WT Docket No. 97-82, Order, Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 97-60 at ¶ 32 (rel. Feb. 28, 1997) ("[I]nstallment payments have been utilized as a means of assisting small entities that are likely to have difficulty obtaining adequate private financing"); *see also id.* at ¶ 34 ("[W]e seek comment on ways that we could refine our installment payment plans to streamline without reducing benefits to small businesses").

[11] *Id.* at ¶ 36.

bidders must make their next quarterly interest payment.

Respectfully submitted,

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: NextWave Personal Communications, Inc., et al., Debtors.	98 B 21529 (ASH) Chapter 11

MEMORANDUM OF LAW IN SUPPORT OF FCC'S MOTION TO LIFT AUTOMATIC STAY

Preliminary Statement

The Federal Communications Commission ("FCC") respectfully submits this memorandum of law in support of its motion pursuant to 11 U.S.C. § 362(d)(1) ("section 362(d)(1)") and Rule 4001 of the Federal Rules of Bankruptcy Procedure for an order lifting the automatic stay in the above-captioned bankruptcy case, which is currently in place pursuant to 11 U.S.C. § 362(a). The federal regulations governing the 63 C block radio spectrum licenses (the "Licenses") that debtor NextWave Personal Communications, Inc. ("NextWave") acquired through the FCC's spectrum auction program

expressly conditioned the grant of the Licenses' upon NextWave's full and timely satisfaction of its winning auction bids. The regulations also provide that, upon NextWave's failure to meet this condition, the Licenses will automatically cancel. In light of the Court's recent avoidance ruling in *NextWave Personal Communications, Inc. v. FCC*, Adv. Pro. No. 98-5178A (Bank. S.D.N.Y.), NextWave will not pay the amount of its winning bids for the Licenses. Accordingly, the FCC respectfully submits that "cause" exists under section 362(d)(1) for the Court to lift the automatic stay so that the regulations' automatic cancellation provisions may take effect.

Argument

1. The requirement that a licensee pay its winning bids to maintain its PCS licenses is the keystone of the FCC's spectrum auction program. FCC regulations condition the grant of C block licenses upon the licensee's "full and timely payment of the winning bid amount." 47 C.F.R. § 24.708(a) (emphasis added); *see also* 47 C.F.R. § 1.2109(a) (1996) (same). The regulations also "permit small businesses . . . and other entities determined to be eligible on a service specific basis, which are high bidders for licenses specified by the Commission, to pay the full amount of their high bids, in installments over the term of their licenses . . . ." 47 C.F.R. § 1.2110(e) (1996) (emphasis added). In such circumstances, "[a] license granted to an eligible entity that elects installment payments shall be conditioned upon the full and timely performance of the licensee's payment obligations under the installment plan." 47 C.F.R. § 1.2110(e)(4) (1996). Absent some applicable grace period, however, a licensee's failure to pay its winning-bid installments in a timely manner will result in the automatic cancellation of its C block licenses. See 47 C.F.R. § 1.2110(e)(4)(iii) (1996).

2. These regulatory conditions upon the Licenses remain fully enforceable by the FCC even though NextWave is in bankruptcy. "Because the estate may take no greater interest than that held by the debtor, the estate takes the license subject to the restrictions imposed on the debtor by its transferor." *In re Farmer's Markets, Inc.*, 792 F.2d 1400, 1403 (9th Cir. 1986) (upholding condition on state liquor license requiring payment of delinquent state taxes prior to transfer of license) (internal citations omitted). Thus, "a trustee must conform in all respects to a license which comes into the estate upon the bankruptcy of a licensee; the trustee occupies the same position as the debtor, including responsibility for all burdens as well as benefits." 5 Lawrence P. King, *Collier on Bankruptcy* ¶ 541.07[3] at 541-40 (1998) (footnotes omitted); *accord In re Bay Ridge Inn, Inc.*, 94 F.2d 555, 557 (2d Cir. 1938) ("Any rights or privileges of the [bankruptcy] trustee [in debtor's liquor license] were created by the New York legislature and were subject to such conditions as it might impose.").

3. It follows that "when a debtor's proprietary interest expires by operation of an express condition, the Bankruptcy Code does not preserve that interest and prevent termination." *In re Gull Air., Inc.*, 890 F.2d 1255, 1262 (1st Cir. 1989) (debtor-airline's "filing of a bankruptcy petition did not preserve [its] interest in [FAA-allotted airport] slots and prevent that interest from automatically expiring upon [debtor's' failure to use slots as required" by FAA regulations). Indeed, given the automatic and non-discretionary nature of the regulatory cancellation provision that has been triggered by the outcome of NextWave's avoidance action against the FCC, see 47 C.F.R. § 1.2100(e)(4)(iii) (1996), the Bankruptcy Code's automatic stay is arguable altogether inapplicable to these circumstances. *See Gull Air*, 890 F.2d at 1264.

Conclusion

For the reasons stated above, the Court should grant the FCC's motion to lift the automatic stay so that the Licenses may cancel automatically.

Dated: New York, New York
May 28, 1999

Respectfully submitted,

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BRIEF OF RESPONDENTS/APPELLEES

ORAL ARGUMENT SCHEDULED

MARCH 15, 2001

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NOS. 00-1402 AND 00-1403

NextWave Personal Communications Inc. and
NextWave Power Partners, Inc.,

PETITIONERS/APPELLANTS,

v.

Federal Communications Commission and
United States of America,

RESPONDENTS/APPELLEES.

BRIEF OF RESPONDENTS/APPELLEES

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Section 362. As the Second Circuit recounted, the bankruptcy court had based its authority to overrule "the FCC's enforcement of the payment schedule established by its regulations . . . chiefly on the automatic stay provision of 11

U.S.C. § 362." JA 1061. Contrary to NextWave's contention (Br. 28), the Second Circuit's discussion of § 362 was not "perfunctory." To the contrary, virtually all of the Second Circuit's *Initial Decision*, as well as the bulk of its *Mandamus Decision*, was devoted to establishing that the Commission's decisions regarding the allocation of licenses are *regulatory* in nature. Having established that point, only a few paragraphs were necessary to reject NextWave's specific reliance on the terms of § 362. After noting that "[t]he automatic stay has its limits" because § 362(b)(4) makes clear that the stay does not apply to a "'proceeding by a governmental unit . . . to enforce such governmental unit's or

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organization's police and regulatory powers,'" the Second Circuit held that "the FCC is a governmental unit that is seeking 'to enforce' its 'regulatory power.'" JA 1061 (*quoting* § 362(b)(4)).

NextWave made the same argument to the Second Circuit that it makes to this Court: that "regulatory power" in § 362(b)(4) is limited by legislative history to some subset of regulatory actions affecting matters such as environmental or consumer protection. *See* NextWave Br. 24; JA 1275-1281. But the text of § 362(b)(4) is not limited in the manner NextWave contends and therefore, we argued in the Second Circuit, the automatic stay did not protect NextWave from the consequences of its failure to pay on time. The Second Circuit agreed and 'h[e]ld that the FCC's regulatory decisions fall within § 362(b)(4)." JA 1061 n.8.

In any event, the Second Circuit correctly rejected NextWave's reliance on § 362. As the Second Circuit emphasized, requiring timely payment serves the regulatory

purpose of "identification of the candidates having the best prospects for prompt and efficient exploitation of the spectrum," and hence § 362(b)(4) makes clear that the stay does not apply. JA 1059. But the regulatory purpose of the payment rules is not limited to preserving the presumption that the licensee is the bidder that established that it was best qualified to serve the public. The full and timely payment requirements also protect other bidders. This Court recognized in *U.S. AirWaves* that the rules requiring satisfaction of the winning bid advance the Commission's essential goals of maintaining auction integrity and fairness to losing bidders. in *U.S. AirWaves*, this Court explained that the Commission could not "simply forgive agreed-upon payments," even in the interests of achieving rapid utilization of the spectrum and furthering competition, since those statutory goals "do not absolve the agency of its duty to losing bidders." 232 F.3d at 235. This Court's decision thus confirms that the full and timely payment requirements are regulatory in

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nature. And in addition to being unfair to losing bidders, for the Commission to decline to enforce the rules against NextWave would be unfair to the many licensees that complied with the *Restructuring Orders*, almost all of whom either lost or surrendered spectrum as a result of those Orders. *See Order*, ¶ 15.

Section 362 also does not apply because cancellation occurred automatically under the Commission's rules, with no requirement for revocation proceedings or other affirmative agency action. This case is therefore analogous to the automatic withdrawal for nonuse of airline landing slots in *In re Gull Air, Inc.*, 890 F.2d 1255 (1st Cir. 1989). The bankruptcy court distinguished *Gull Air* as a case "pertaining

to regulatory non-use conditions, no vindication of the government's pecuniary interest." *See* JA 1409. The Second Circuit invalidated this rationale by explaining that the timely payment requirement serves as a regulatory, not merely a pecuniary, purpose. In any event, the main basis for the *Gull Air* decision was not the purpose of the regulation in question, but its self-executing nature. The automatic stay prevents only the "commencement" or "continuation" of some "action" against the debtor. Like the FAA in *Gull Air*, the FCC did nothing to initiate cancellation in this case.

Its self-executing nature also explains why cancellation did not violate § 362(a)(3)'s proscription against seizing estate property. "Property of the estate" is defined in § 541 of the Code to mean "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541. Congress clearly did not intend to "expand the debtor's rights against others more than they exist at the commencement of the case." H.R. Rep. No. 95-595, at 367 (1978), *reprinted in* 1978 U.S.C.C.A.N. at 5787, 6323. *See Moody v. Amoco Oil Co.*, 734 F.2d 1200, 1213 (7th Cir.), *cert. denied*, 469 U.S. 982 (1984) ("whatever rights a debtor has in property at the commencement of the case continue in bankruptcy – no more, no less"). The

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nature of the property interest a debtor brings to a bankruptcy estate is determined in accordance with applicable nonbankruptcy law. *Official Committee of Unsecured Creditors v. PSS Steamship Co. (In re Prudential Lines, Inc.)*, 928 F.2d 565, 569 (2d Cir. 1991). Thus, even if NextWave's interest in the licenses can be properly characterized as a

property right,[11] that right was always delimited by the regulatory conditions placed on the licenses. NextWave had only a conditional right to use the licenses, contingent on remaining qualified to hold them by continued compliance with the Commission's auction-related rules and orders. Accordingly, no property was seized.

NextWave's heavy reliance on the bankruptcy court's decision in *In re Kansas Personal Communications Services, Ltd.*, 252 B.R. 179 (Bankr. D. Kan. 2000), is misplaced. That decision, which involved another C-block licensee whose licenses canceled in bankruptcy, was reversed by the district court one week after NextWave's brief was filed. *See Memorandum and Order*, D. Kan. Dec. 18, 2000 (Supp. App. 1494). In its opinion, the district court found that § 362(a)(3) did not apply. It recognized that, "A license to use part of the radio spectrum is a right granted by the FCC and is subject to conditions and restrictions imposed by the FCC." *Id.* *4. Stating that the issue depended on whether cancellation constituted an "act" to obtain control over the licenses, *id.* *5, the court said it would defer to the FCC's interpretation of its rules. *Id.* *6-7. The court also stated that "the plain language of the FCC regulations stating that a license 'will automatically cancel' leaves little room for interpretation." *Id.* *7, n.5.[12]

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[11] The Second Circuit disagreed with this premise, stating that "A license does not convey a property right," JA 41 (citations omitted), and that FCC licenses were not equivalent to "a property estate in spectrum." JA 44-45.

[12] NextWave's citation to subsections (4) and (5) of § 362(a) is likewise misplaced. As the Second Circuit held, those provisions "are concerned with liens." JA 1061 n.7.